Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-127

GARY MESSINA,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

GARY MESSINA,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner, Gary Messina, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey denying both an appeal and a petition for certification from the decision of the Superior Court of New Jersey, Appellate Division, which had affirmed the petitioner's conviction for first degree murder, conspiracy to commit murder, and possession of a pistol while committing murder.

OPINIONS BELOW

The order of the Supreme Court of New Jersey is set forth in the Appendix hereto at 9a. It has not yet been reported.

The opinion of the Superior Court of New Jersey, Appellate Division, is set forth in the Appendix at 1a. It is unreported.

The opinion of the Supreme Court of New Jersey in *New Jersey v. Corbitt*, announced on October 6, 1977, is reported at 74 N.J. 379, 378 A.2d 235 (1977). A copy of that opinion is set forth in the Appendix at 15a.

The constitutional issues involved in the *Corbitt* decision are presented in a somewhat different facet in the instant petition for certification.

JURISDICTION

The Supreme Court of New Jersey rendered its order denying both direct appeal and a requested petition for certification on May 2, 1978.

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether due process of law and fundamental justice was denied petitioner who was permitted by the trial court, in essence, to "plead guilty" before the jury during the midst of a contested trial without the trial court's first utilizing the standard procedures in normal plea situations of ascertaining the defendant's understanding as to the nature of such a plea and the legal consequences which may follow therefrom.

2. Whether this Court should not take the opportunity presented by this record to reappraise and reformulate the law applicable to both pleas of guilt and judicial confessions resulting in repeated dissents in this Court.

3. Whether the issues involved herein are not so closely integrated with those presented by *Corbitt v. New Jersey*, No. 77-5903, as to which this Court has noted probable jurisdiction with respect to the constitutionality of the identical state murder statute under which the petitioner was convicted, so as to justify grant of certiorari and consolidation of the instant case with *Corbitt v. New Jersey, supra.*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional, statutory and state rule provisions involved are:

1. The Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

2. 28 U.S. Code, §1257.

3. *N.J.S.A.* 2A:113-1 to 4; *N.J.S.A.* 2A:98-1, and *N.J.S.A.* 2A:151-5.

4. New Jersey Court Rules 2:12-9 and 3:9-2.

These are set forth in the Appendix at p. 1a to p. 8a.

STATEMENT OF THE CASE

The first important constitutional question presented by this record is whether due process of law, particularly in the fundamental fairness sense, was accorded petitioner in his state trial for first degree murder when the trial court permitted him to use the self-incriminating words of art before the jury, "I would like to plead guilty to murder and murder while armed" without at any time interrogating him as to his understanding of the nature of such a plea and of the legal consequences to flow therefrom.

The second constitutional issue raises the interrelationship of this cause with that as to which this Court has noted probable jurisdiction in *Corbitt v. New Jersey*, No. 77-5903. The identical state murder statute is involved in each proceeding, *i.e.*, *N.J.S.A.* 2A:113-1 to 4, which mandates life imprisonment following conviction where there has been a trial and conviction although a lesser sentence can be imposed by the trial court following a plea of *non vult* (the New Jersey equivalent of a plea of guilty), or *nolo contendere*.

It appears highly probable that petitioner Messina, a layman, acting contrary to the advice of his own attorney in stating to both the trial court and the jury that he wished to plead guilty to the two counts of the indictment charging him with first-degree murder, was seeking in a confused and mistaken way to avoid the mandatory life sentence required by the New Jersey murder statute. The petitioner here was faced with the identical grim choice presented to Corbitt of making an election between going to trial and running the risk of a mandatory life sentence or pleading *non vult* to be eligible for a lighter sentence. As in *Corbitt*, *supra*, petitioner's constitutional rights were violated by the New Jersey murder statute in the following ways:

1. The New Jersey murder statute penalizes the exercise of his Fifth and Sixth Amendment rights by imposing a mandatory life sentence upon only those defendants who have been convicted of first degree murder after a jury trial, as was done with respect to the petitioner.

2. The sentencing provisions of the New Jersey murder statute violate the equal protection clause of the Fourteenth Amendment by establishing separate scales of punishment for the same offense depending on whether the accused has exercised his right to a trial.

Since the instant record presents an important facet of that involved in *Corbitt*, *supra*, certiorari should be granted here also to permit all phases of the coercive effect of the New Jersey murder statute to be considered by this Court in its ultimate decision of the constitutionality of that statute.

Essentially, the extended state trial involved the factual question of whether it was petitioner Messina or his co-defendant, Anthony Flora, who had murdered one Michael Amodio on June 29, 1976, in the Borough of West Caldwell, Essex County, New Jersey. Amodio's murder was undisputed. It was equally undisputed that (1) both defendants had known of the murder which was committed in the garage of the Messina home through the use of a pistol belonging to Flora's father, and (2) both defendants had participated in burying Amodio's body in a wooded area in West Milford, Passaic County, New Jersey.

The murder of Amodio followed shortly after an incident in which a young woman, Roseann Casale, was hospitalized and was in a coma as a result of receiving either an overdose of heroin or heroin of poor quality.

Amodio was her "boy friend." Flora was her nearby neighbor and had had a virtual brother-sister relationship with her since their childhood. Messina, a friend of Amodio's, had apparently d eloped an unrequited attachment for her. The State's position at trial was that the motive for the shooting of Amodio was revenge for the supposed overdose of Roseann Casale, Amodio being blamed by the two defendants as the one responsible.

Each defendant was charged with murder in the first degree under the New Jersey statute, *N.J.S.A.* 2A:113-1 *et seq.*, conspiring to commit murder in violation of *N.J.S.A.* 2A:98-1, and possession of a pistol while committing murder in violation of *N.J.S.A.* 2A:151-5.

Each defendant pleaded not guilty.

Following an extended jury trial held during parts of November and December 1976, each defendant was found guilty of each of the three counts specified in the indictment. The trial court imposed sentence immediately after the jury verdict. Each was sentenced to the mandatory term of life imprisonment on the murder charge. The conspiracy charge and the armed feature of the murder were merged with the murder conviction. Co-defendant Flora's appeal from his conviction is presently pending in the Superior Court of New Jersey, Appellate Division, and is being handled by the Public Defender of that State.

The constitutional issue of due process of law in the fundamental fairness sense is presented by the manner in which the trial court dealt with the attempt by petitioner Messina in the middle of his cross-examination by the State to change his plea of not guilty and to plead instead guilty to the charges of both first degree murder and committing the murder with a gun.

The State had proved the murder and had submitted testimony and evidence to establish the involvement of both defendants. Each defendant thereupon testified in his own defense and produced witnesses. Flora's defense preceded Messina's. Each accused the other of firing the fatal shots without his knowledge or participation, thereby presenting him with a *fait accompli* upon discovery of the body. Each also explained his subsequent participation in the burying of Amodio's body as resulting from initial fear of being murdered himself by the other to avoid disclosure and further fear of being charged with participation in the murder.

In his direct defense, petitioner Messina contended that Flora had murdered Amodio in the garage of the Messina home while he (Messina) was upstairs. During his cross-examination, Messina asked to speak to Flora's attorney. There followed a recess in which Messina's attorney counselled him not to confess to the slaying. After this recess, his attorney (not present counsel for Messina) advised the trial judge that Messina wanted to plead guilty to the charges of murder and the armed feature of the murder, but not to the conspiracy charge. The prosecutor, however, declined to recommend acceptance of a guilty plea unless it was as to all three counts. Messina's counsel recommended against such a plea. Accordingly, the trial judge refused to accept the guilty pleas. The constitutional issue of due process of law in the sense of fundamental fairness came into the trial at that point.

Without communicating at any time with Mr. Messina to determine whether he understood the legal consequences of his action in attempting to plead guilty to the charge of first degree murder, the trial court stated in his presence and hearing that he could testify to the jury as to his guilt. The court declared in this regard:

"THE COURT: Your client can testify as to the guilty (sic) to Counts 2 and 3 during the course of the testimony and let the jury make a determination of the first count (conspiracy to commit murder)."

The trial court further advised Mr. Messina's counsel (again in his presence):

"• • • it would be an absurdity for me now to sever and declare a mistrial, and then go to trial on the conspiracy alone, with the State's case having been concluded, and one third or one half of the defendant's case or more, I mean one defendant has concluded his case or more, *so that the defendant has got his right to say to this jury whatever he sees fit*, but absent an approval by the State to a severance and a declaration of a mistrial I find that I have no authority, gentlemen, to accept the plea, except to the indictment, particularly without the recommendation of counsel for the defendant, for while I have a great deal of respect I am not going to take the plea to two counts. *The defendant may resume the stand, testify, give such answers to the question as propounded* to him by the Prosecutor, that are propounded to him by Mr. Cleary (counsel for co-defendant Flora), and if there is admission of guilt I will submit the issue of his guilt to the jury, Mr. Brown (then counsel for petitioner Messina)." (Emphasis supplied).

Thereupon, Mr. Messina immediately resumed the stand, and in the presence of the jury stated (pursuant to the advice gratuitously and erroneously given to him by the trial court):

"Q. Mr. Messina, when we left off we were discussing the conversation you had with Assistant Prosecutor Mautone, is that correct? A. Yes. I would like to address the Court, state I would like to plead guilty to murder and murder while armed, and that there was no conspiracy involved whatever, and that Anthony Flora, [illegible] was just confused."

The trial court did not in any way challenge Mr. Messina's use of the crucial phrase, "I would like to plead guilty to murder and murder while armed," nor did it question him as to whether he understood the legal effect of his making such a prejudicial statement.

After this statement by Mr. Messina, extensive cross-examination and re-cross-examination continued by both the prosecutor and counsel for Flora. Messina claimed that everything he had previously testified to denying his guilt was a lie, and that he alone had shot Amodio.

Following the court's charge to the jury, the jury found each defendant guilty of each of three charges in the indictment. The two defendants received identical sentences.

The issue of denial of due process of law in the sense of fundamental fairness was vigorously raised before the Superior Court of New Jersey, Appellate Division. On February 24, 1978, the Appellate Division in an unreported *per curiam* opinion affirmed Mr. Messina's conviction. The Appellate Division rejected the contentions that (1) the trial judge erred in not advising Messina of the consequences of his statement that he wished to plead guilty to murder, and (2) he was prejudiced by the advice given to him by the trial judge that he could admit his guilt to the murder and armed charges and leave to the jury the determination as to conspiracy.

Petitioner then applied to the Supreme Court of New Jersey for a Petition of Certification. He also filed a direct appeal on the ground that the appeal was solely limited to

constitutional issues involving questions of due process of law, and accordingly came within New Jersey Court *Rule* 2:2-1 (a) as a case "determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or this State."

Petitioner at the same time raised for the first time in the proceedings the identical constitutional arguments advanced by the defendant in *New Jersey v. Corbitt*, 74 N.J. 379, 378 A.2d 235 (1977).

The Supreme Court of New Jersey denied both the direct appeal and the Petition for Certification. Such denial was by order rather than by written opinion ( ). It is from this order dated May , 1978 that petitioner seeks petitions for certiorari.

The petitioner is presently incarcerated in the New Jersey State Prison at Trenton.

REASONS FOR GRANTING THE WRIT

I.

Petitioner presents for review an important federal question not heretofore determined by this court; namely, whether due process and fundamental justice was denied him when he was permitted by the trial court, in essence, to "plead guilty" before the jury during the midst of a contested trial without the trial court's first utilizing the standard procedures in normal plea situations of ascertaining the defendant's understanding as to the nature of such a plea and the legal consequences which may follow therefrom.

The instant record presents an important and undecided facet of the judicial obligation to interrogate a defendant who seeks to plead guilty of a criminal offense. It is firmly settled that before such a plea can be accepted by the trial court, the court must first personally question the defendant to ascertain whether or not the latter understands the nature of the charges and the consequences of the plea. See, *e.g.*, *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969); *McCarthy v. United States*, 394 U.S. 459, 89 S. Ct. 1166, 22 L.Ed.2d 418 (1969); *Henderson v. Morgan*, 426 U.S. 637, 96 S. Ct. 2253, 49 L.Ed.2d 108 (1976).

We readily concede that what occurred at the trial below is not exactly parallel to the traditional plea of guilty in the sense that such plea is accepted by the trial court and results in an adjudication of guilt thereafter by the trial court and without a jury verdict. Here the adjudication was made instead by the jury. This distinction, although real in some aspects, in in actuality irrelevant to the fatal damage suffered by petitioner Messina when the trial judge, without any cautionary action whatsoever, let

pass without comment or interrogation Messina's dramatic statement in the witness box and in the presence of the jury, "I would like to address the Court, state I would like to plead guilty to murder and murder while armed. • • •"

Whether or not legal scholars can distinguish this plea of guilty made in open court before a jury from a true plea of guilty or *non vult* is simply not the point in the fundamental-fairness sense. The overriding question instead is whether the trial court, chargeable with notice of the devastating and decisive impact of such an announced plea of guilty made in presence of the jury, was bound to go beyond the strict and literal construction of the nature of the plea to ascertain whether the petitioner fully understood the consequences of his plea, couched as it was in the identical language that would have mandated such judicial inquiry as a prerequisite to its being accepted by the trial court.

The question which the New Jersey courts have prejudicially failed to deal with is whether the distinction between what Messina said and a true plea of guilty is the familiar distinction without a difference so far as the inevitability of conviction is concerned.

Under New Jersey's murder statute, a plea of guilty to a first-degree murder charge made to a trial judge and accepted by the court permits a sentence of a term of years or even a suspended sentence. *New Jersey v. Corbitt*, *supra*. A jury conviction in New Jersey of murder carries a mandatory life sentence. To say the least, the stakes were extraordinarily high for Messina with respect to whether he correctly understood what the trial judge was telling him in ambiguous phraseology on how he could advise the jury of his position, after he had put the trial judge on notice of his intention to plead guilty.

Legal technicalities as to what is the precise, mint-condition type of plea of guilty or *non vult* (as contrasted with an in-court confession) can hardly gloss over the denial of due process of law in the fundamental-fairness sense resulting from the trial court's failure to interrogate Messina personally to ascertain whether he fully understood the result of his statement to the jury that he wished to plead guilty to the charges of murder.

The Court is faced with the untenable absurdity that the precise words which would have required the trial court to question Messina personally if accepted by that court as the basis for a successful plea of guilty will nevertheless sustain a mandatory life sentence if the petitioner is denied relief here. To deny him such relief under these circumstances is to elevate form above substance. The duty of a trial court to conduct a trial with full due process of law was converted below into an exercise in scholastic legalisms. Fundamental fairness must recoil from approval of what turned out to be virtually a judicial trap with the forfeit a life sentence where the defendant (as Messina did here) in a murder trial fails to understand vague advice gratuitously given him by the trial court.

Messina, in his limited understanding, told [illegible] precisely what the trial court had stated in his h[illegible] could do.

Both the Superior Court of New Jersey, Appellate Division, and the Supreme Court, rejected our constitutional argument. The Appellate Division in its opinion reasoned that the trial court did not accept Messina's plea of guilty (more accurately, *non vult*):

> "However, defendant's reliance on cases dealing with guilty pleas is misplaced, since the trial judge, pursuant to the discretion vested in him by R. 3:9-

> 2, did not accept the defendant's plea of guilty or non vult. Similarly, defendant's argument that the Rule precludes the admission into evidence of any admission made by a defendant where a plea of guilty is refused is likewise irrelevant since the record makes it clear that no admission made by the defendant during the inquiry regarding the proffered plea was used at the trial. Defendant's admission of guilt to the jury during cross-examination in no way referred to the inquiry nor was it the product of said inquiry and is therefore not within the comprehension of R. 3:9-2. Simply stated, this was not a plea which, if accepted, meant that defendant waived his right to a trial by jury on the issue of his guilt or innocence. Defendant was before the jury and the jury still had to rule on the issue of defendant's guilt regardless of his self-inculpation. Under the circumstances, we are not persuaded that the trial judge was obligated to explain to the defendant the consequences of his anticipated testimony nor do we agree with defendant's assertion that the trial judge's failure to do so constituted an evasion of judicial responsibility and abdication by the court of its special and singular function."

We would be constrained to agree with the Appellate Division of the state court if the trial court had used neutral words, such as, "Tell the jury exactly what happened." That, however, was not what the trial court stated. Instead, the trial court stated with what was at least prejudicial ambiguity, "The defendant may resume the stand, testify, give such answers to the questions as propounded to him by the Prosecutor, that are propounded to him by Mr. Cleary [counsel for co-defendant Flora] and if there is admission of guilt I will submit the issue of his guilt to the jury, Mr. Brown [counsel for Messina]." Immediately following this gratuitous instruction (made in Messina's hearing) the petitioner, without any challenge or caution whatsoever from the trial judge either before he spoke or after, resumed the witness stand and stated that he wished to plead guilty to the two counts of the indictment charging murder. He thereby used (with the trial court's implicit sanction) words of art ("I would like to plead guilty") which have been acknowledged to have a decisive, irreparable effect upon a jury.

The courts have recognized the devastating effect of disclosure of a prior guilty plea to a jury. *People v. Haycraft*, 76 Ill. App. 2d 149, 221 N.E.2d 317, 319 (App. Ct. Ill. 1966) emphasizes that it is difficult to conceive a disclosure more apt to influence a jury than the information that the accused had at one time pleaded guilt to the commission of the crime with which he stands charged. That court made starkly clear the trap which the trial court here permitted Messina to enter: "We can think of nothing more damaging to an accused in the minds of the jury than the disclosure, however brief, that he had admitted guilt and once that disclosure has been made we cannot say that he has received the fair and impartial trial to which he is entitled." See similarly, *People v. Bain*, 10 Ill. App. 3d 909, 295 N.E.2d 295, 296-297 (App. Ct. Ill. 1973).

Indeed, in *State v.Boone*, 66 N.J. 38, 48, 327 A.2d 661, 666-667 (1974) the Supreme Court of New Jersey recognized the fatal peril in which a defendant is placed where a jury is permitted to learn that he has at any time pleaded guilty to the charge for which he is on trial. The New Jersey Supreme Court there noted "the virtually conclusive effect the evidence of a guilty plea will have on a jury." (32 A.2d at 667).

Fundamental fairness dictates that the cautionary instructions which must be given by a trial court before it accepts a plea of guilty must also be given where a defendant employs identical words but the determination of guilt

is made instead by the jury. The judicial methods employed here border so closely on entrapment as to offend "a sense of justice." *Rochin v. California*, 324 U.S. 165, 173, 72 S. Ct. 205, 96 L.Ed. 183, 190, 25 A.L.R.2d 1396 (1952).

The New Jersey courts at every level—the trial court, the Appellate Division, and the Supreme Court—have sanctioned an academic and illusory distinction between two types of pleas of guilty even though both inevitably have the same ultimate effect: A conviction and sentencing of the defendant as a direct result of his plea of guilty. This result virtually inevitably follows, regardless of whether it is accepted by the trial court or made instead to the jury with the trial court's implicit sanction, as here. The inevitability of conviction is analogous to what this Court recognized in a line-up situation in *Foster v. California*, 394 U.S. 440, 443, 89 S. Ct. 1127, 22 L.Ed.2d 402, 407 (1969):

> "The suggestive elements in this identification procedure made it all but inevitable that David [identifying witness] would identify petitioner whether or not he was in fact 'the man.'"

The untenable distinction between these two types of guilty pleas denies the defendant due process of law in the fundamental-fairness sense. As this Court held in *Lisenba v. California*, 314 U.S. 219, 236, 62 S. Ct. 280, 86 L.Ed. 166, 180 (1941), the inquiry, in the enforcement of the constitutional guaranty of due process, is whether there has been observance of "that fundamental fairness essential to the very concept of justice." "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." *Ibid.* See, similarly, *Chambers v. Florida*, 309 U.S. 227, 60 S. Ct. 472, 84 L.Ed. 716 (1940); *Brown v. Mississippi*, 297 U.S. 278, 56 S. Ct. 461, 80 L.Ed. 682 (1936); *Malinski v. New York*, 324 U.S. 401, 416-417, 65 S. Ct. 781, 789, 89 L.Ed. 1029 (1945).

In *Offut v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 13, 99 L.Ed. 11, 16 (1954), this Court, speaking through Mr. Justice Frankfurter, warned: "Justice must satisfy the appearance of justice." That indispensable element of due process of law was denied here.

United States v. Boyce, 340 F.2d 418, 420 (4th Cir. 1964) holds that the defendant's conviction cannot stand if there is only a reasonable probability that the admission of a co-defendant's extrajudicial confession after he had pleaded guilty had been prejudicial to the defendant.

This Court has recognized for many years that the very character of certain procedures makes it impractical to establish the degree of prejudice which has resulted therefrom. *Hamilton v. Alabama*, 368 U.S. 52, 82 S. Ct. 157, 7 L.Ed.2d 114 (1961). The rule which emerges from the Court's decisions is that the defendant need not show that he was *actually* prejudiced during his trial in order to establish a denial of due process of law; it is enough if he can show there was a reasonable *probability of prejudice*. See, *e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L.Ed.2d 600 (1966) (pretrial publicity); *Ward v. Monroeville*, 409 U.S. 57, 93 S. Ct. 80, 34 L.Ed.2d 267 (1972) (traffic offender tried before a mayor of a town which was heavily dependent on traffic fines); *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L.Ed. 942 (1955) (contempt trial before same judge who presided at the grand jury hearing during which alleged contempt occurred); *Boykin v. Alabama, supra*; *McCarthy v. United States, supra*.

In *McCarthy, supra*, this Court said with respect to a defendant who enters a plea of guilty (394 U.S. at 466, 22 L.Ed.2d at 425):

> "A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. 458, 464, 82 L.Ed 1461, 1466, 58 S. Ct. 1019, 146 A.L.R. 357 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."

In every realistic sense, Messina's fateful statement before the jury that he wished to plead guilty to the murder counts of the indictment was a plea of guilty having an enormously impressive effect upon the jury. *Cf. Foster v. California, supra*, 394 U.S. at 443. If federal constitutional protections intended to assure that defendants receive full due process of law are to have any validity, they are not to be avoided by the circuitous euphemism of technically declining to accept a plea of guilty but instead permitting (and, indeed, virtually instructing) the defendant to tell the jury he is so pleading. The trial court's action in this regard was an evasion of its judicial responsibility. It was a palpable abdication by the court of its special and singular function. See, *e.g., Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L.Ed.2d 705, *reh. denied*, 386 U.S. 987, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967); *United States v. Chibbaro*, 361 F.2d 365, 378-379 (3d Cir. 1966). The Supreme Court of New Jersey erroneously departed from its own correct guideline set forth in *State v. Wolf*, 44 N.J.

176, 191, 207 A.2d 670, 679 (1965): "It seems sufficient to say that when a citizen's life is at stake, a trial in a court of justice is not a game and the judge is more than an umpire."

II.

Petitioner presents for review a record which affords this court an opportunity to reappraise and reformulate the law applicable to both pleas of guilt and judicial confessions which has resulted in repeated dissents in this court.

This record affords the Court a unique opportunity to harmonize disparate views among members of the Court concerning the judicial effect to be given extra-judicial and judicial confessions and admission. It is particularly appropriate for the Court to grant certiorari in the instant cause since the issues involved here appear to fall within a grey area which has not hitherto been presented for adjudication.

We set forth below a brief recapitulation of the various strands of judicial reasoning in the important area of confessions and judicial admissions:

1. A prior withdrawn plea of guilty is inadmissible in a criminal case. *Kercheval v. United States*, 274 U.S. 220, 47 S. Ct. 582, 584, 71 L.Ed. 1009 (1927); *cf. People v. Spitaleri*, 9 N.Y.2d 168, 212 N.Y.S.2d 53, 173 N.E.2d 35, 36-37, 86 A.L.R.2d 322 (Ct. App. N.Y. 1961) reviewing the later history of the *Kercheval* rule).

2. A plea of guilty in a state court is entered without due process of law where the defendant's plea of guilty is involuntary in the sense that he did not receive adequate notice of the offense. *Henderson v. Morgan*, 426 U.S. 637,

96 S. Ct. 2253, 49 L.Ed.2d 108 (1976); *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969).

3. A confession obtained by coercion is inadmissible. *Lynumn v. Illinois*, 372 U.S. 528, 83 S. Ct. 917, 9 L.Ed.2d 922 (1963); *Brown v. Mississippi*, 297 U.S. 278, 56 S. Ct. 461, 80 L.Ed. 682 (1936).

4. A confession secured without the *Miranda* warnings is inadmissible. *Miranda v. Arizona*, 324 U.S. 436, 85 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

5. The trial court must personally interrogate the accused as to the latter's understanding of a plea of guilty and determine that the plea was made voluntarily with an understanding of the nature of the charge and the consequences of the plea. *McCarthy v. United States*, 394 U.S. 459, 89 S. Ct. 1166, 22 L.Ed.2d 418 (1969).

6. A death penalty statute is unconstitutional where it needlessly encourages guilty pleas, while penalizing those defendants who exercise their Fifth and Sixth Amendment rights to a jury trial. *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L.Ed.2d 138 (1968).

7. A guilty plea may be held to be valid as voluntarily and knowingly made, notwithstanding that the defendant might have been partially motivated by fear of the death penalty where the record shows that the defendant was advised by competent counsel and was made aware of the nature of the charge against him. *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L.Ed.2d 747 (1970); *Parker v. North Carolina*, 397 U.S. 790, 90 S. Ct. 1458, 25 L.Ed.2d 785 (1970). Justices Brennan, Douglas and Marshall have expressed varying degrees of disagreement with these holdings in a separate opinion set forth in the *Parker* case, 397 U.S. at 799.

8. A counseled plea of guilty is an admission of factual guilt so reliable that where voluntary and *intelligent*, it quite validly removes the issue of factual guilt from the case. *Menna v. New York*, 423 U.S. 61, 63, 96 S. Ct. 241, 46 L.Ed.2d 195, 198 (1975); *McMann v. Richardson*, 397 U.S. 759, 90 S. Ct. 1441, 25 L.Ed.2d (1970). Petitioner here acted contrary to his attorney's advice. In *McMann*, *supra*, Mr. Justice Brennan stated in a dissent, joined by Mr. Justice Douglas and Mr. Justice Marshall, that, "In this case the Court moves yet another step toward the goal of insulating all guilty pleas from subsequent attack no matter what unconstitutional action of government may have induced a particular plea." (397 U.S. at 775; 25 L.Ed.2d at 776).

Clearly, there is an urgent need for the Court to reappraise its position with respect to the interrelated questions of judicial confessions, judicial admissions and pleas of guilty, whether accepted by the trial court or not, which are made in the presence of the jury, as here, or communicated in any manner to the jury. The instant record affords the proper opportunity for the Court to review this important area of constitutional and criminal law. The need for such review is heightened by its close relationship to the parallel question analyzed below of the coercive effect of the state murder statute involved here which presents those accused of first-degree murder in New Jersey with the Hobson's choice of either pleading guilty to avoid a mandatory life imprisonment if found guilty after jury trial or going to trial under the presumption of innocence to run the risk of such mandatory life sentence if convicted.

III.

Petitioner presents for review the question whether the issues herein are not so closely integrated with *Corbitt v. New Jersey*, No. 77-5903, as to which this court has noted probable jurisdiction with respect to the constitutionality of the identical state murder statute under which he was convicted, so as to justify grant of certiorari and consolidation of the instant case with *Corbitt v. New Jersey*.

On February 21, 1978, this Court noted probable jurisdiction in *Corbitt v. New Jersey*, No. 77-5903 (46 LW 3526). The ruling below in that case has been printed. *New Jersey v. Corbitt*, 74 N.J. 379, 378 A.2d 235 (1977).

In *Corbitt*, a majority of the Supreme Court of New Jersey ruled that the New Jersey murder statute, *N.J.S.A.* 2A:113-1-*N.J.S.A.* 2A:113-4(a) under which a defendant who pleads *non vult* or *nolo contendere* can receive a life sentence or imprisonment for not more than 30 years, while a defendant who is convicted of first degree murder after a jury trial receives a mandatory life sentence (as the petitioner in the instant case did) does not violate either (1) the Fifth Amendment right to plead guilty, (2) the Sixth Amendment right to a jury trial, or (3) the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Two Justices of the New Jersey Supreme Court dissented ( ).

In his appeal and petition for certification in the New Jersey Supreme Court, petitioner expressly relied upon these dissents in *Corbitt, supra*, in arguing for reversal of his conviction.

The issues involved in *Corbitt* are squarely applicable to the petitioner here. New Jersey firmly takes the position that a conviction of first degree murder after a jury trial must result in a mandatory sentence of life imprisonment. See, *e.g., New Jersey v. Corbitt, supra; State v. Funicello*, 60 N.J. 60, 68, 286 A.2d 55 (1972), *cert. denied, sub nom. New Jersey v. Presha*, 408 U.S. 942, 92 S. Ct. 2849, 33 L.Ed.2d 766 (1972); *State v. Belton*, 60 N.J. 103, 111, 286 A.2d 78 (1972); *N.J.S.A.* 2A:113-4.

None of this was explained to petitioner Messina. He may well have believed that he would receive a lesser sentence if he took the course he actually followed. The pressure on him to plead guilty to escape New Jersey's mandatory life sentence is obvious.

The probability is strong that Messina, a layman acting contrary to the advice of his attorney, changed his testimony by reason of a mistaken understanding of the consequences of his telling the judge and jury that he wished to plead guilty to the murder charges.

There is at this point a coalescence of both issues raised in this Petition for Certiorari, *i.e.*, (1) the question of fundamental fairness, and (2) the unconstitutional nature of the murder statute of New Jersey under which both the petitioner and Corbitt were convicted.

In the appeal filed on behalf of Corbitt, the Public Defender of New Jersey has presented the following questions for review by this Court: (1) Does the New Jersey murder statute serve to penalize the exercise of a murder defendant's Fifth and Sixth Amendment rights to a jury trial? (2) Does the Equal Protection Clause permit New Jersey to enact a statute that provides different scales of punishment for those persons who plead to the charged offense as opposed to those persons who are convicted, as here, after jury trial?

We shall not take the time of this Court to restate the arguments and citations which led it to note probable jurisdiction in *Corbitt v. New Jersey*. We incorporate, as though set forth fully here, the two dissenting opinions in the New Jersey Supreme Court (42a-61a).

We respectfully urge that the instant case presents a parallel factual record which should be consolidated with the Court's consideration of the issues in *Corbitt, supra*. This will permit a fuller analysis and disposition by this Court of the issues raised by this palpably coercive New Jersey murder statute. *Cf. McMann v. Richardson*, 397 U.S. 759, 90 S. Ct. 1441, 25 L.Ed.2d 763 (1970) where this Court dealt with similar constitutional issues raised by three convicts who had pleaded guilty in unrelated cases in various New York courts.

The State of New Jersey will not be prejudiced in any way by consolidation of this cause with *Corbitt*. Coincidentally, the identical murder statute and the same state, county, and prosecutor are all involved in both cases. The issues in *Corbitt* are thus fully known to the respondent here.

CONCLUSION

The petition for a writ of certiorari should be granted and the appeal in the instant cause consolidated for argument with *Corbitt v. New Jersey*, No. 77-5903.

Respectfully submitted,

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By /s/ Daniel Crystal
DANIEL CRYSTAL
A Member of the Firm

ALBERT L. COHN
Of Counsel

Dated: Saddle Brook, New Jersey
July 11, 1978

APPENDIX

Fifth Amendment, Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment, Section 1, Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S. Code, §1257 (Relating to Jurisdiction of this Court)

§1257. State courts; appeal, certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

New Jersey Annotated Statutes, N.J.S.A. 2A:98-1 (Conspiracy)

2A:98-1. Conspiracy

Any 2 or more persons who conspire:

a. To commit a crime; or

b. Falsely and maliciously to indict another for a crime, or to procure another to be charged or arrested; or

c. Falsely to institute and maintain any suit; or

d. To cheat and defraud a person of any property by any means which are in themselves criminal; or

e. To cheat and defraud a person of any property by any means which, if executed, would amount to a cheat; or

f. To obtain money by false pretenses; or

g. To conceal or spread any contagious disease; or

h. To commit any act for the perversion or obstruction of justice or the due administration of the laws—

Are guilty of a conspiracy and each shall be punished, in the case of a conspiracy to commit a crime involving the possession, sale or use of narcotic drugs, as for a high misdemeanor and in all other cases, as for a misdemeanor.

Amended by L.1952, c. 91, p. 425, §1.

New Jersey Annotated Statutes, N.J.S.A. 2A:113-1 (Murder)

2A:113-1. Murder

If any person, in committing or attempting to commit arson, burglary, kidnapping, rape, robbery, sodomy or any unlawful act against the peace of this State, of which the probable consequences may be bloodshed, kills another, or if the death of anyone ensues from the committing or attempting to commit any such crime or act; or if any person kills a judge, magistrate, sheriff, constable or other officer of justice, either civil or criminal, of this State, or a

marshal or other officer of justice, either civil or criminal, of the United States, in the execution of his office or duty, or kills any of his assistants, whether specially called to his aid or not, endeavoring to preserve the peace or apprehend a criminal, knowing the authority of such assistant, or kills a private person endeavoring to suppress an affray, or to apprehend a criminal, knowing the intention with which such private person interposes, then such person so killing is guilty of murder.

Amended by L.1971, c. 2, §7, eff. Jan. 15, 1971.

New Jersey Annotated Statutes, N.J.S.A. 2A:113-2 (Degrees of Murder)

2A:113-2. Degrees of murder; designation in verdict

Murder which perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which is committed in perpetrating or attempting to perpetrate arson, burglary, kidnapping, rape, robbery or sodomy, or which is perpetrated in the course or for the purpose of resisting, avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, or murder of a police or other law enforcement officer acting in the execution of his duty or of a person assisting any such officer so acting, is murder in the first degree. Any other kind of murder is murder in the second degree. A jury finding a person guilty of murder shall designate by their verdict whether it be murder in the first degree or in the second degree.

Amended by L.1965, c. 212, §1, eff. Dec. 23, 1965.

New Jersey Annotated Statutes, N.J.S.A. 2A:113-3 (Murder Plea)

2A:113-3. Murder; plea of guilty not to be received; plea of non vult or nolo contendere and sentence thereon.

In no case shall the plea of guilty be received upon any indictment for murder, and if, upon arraignment, such plea is offered, it shall be disregarded, and the plea of not guilty entered, and a jury, duly impaneled, shall try the case.

Nothing herein contained shall prevent the accused from pleading non vult or nolo contendere to the indictment; the sentence to be imposed, if such plea be accepted, shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree.

New Jersey Annotated Statutes, N.J.S.A. 2A:113-4 (Murder; punishment)

2A:113-4. Murder; punishment

Every person convicted of murder in the first degree, his aiders, abettors, counselors and procurers, shall suffer death unless the jury shall by its verdict, and as a part thereof, upon and after the consideration of all the evidence, recommend life imprisonment, in which case this and no greater punishment shall be imposed.

Every person convicted of murder in the second degree shall suffer imprisonment for not more than 30 years.

New Jersey Annotated Statutes, N.J.S.A. 2A:151-5 (Additional sentence for armed criminals)

2A:151-5. Additional sentence for armed criminals

Any person who commits or attempts to commit an assault, robbery, larceny, burglary, breaking and entering, rape, murder, mayhem, arson, abduction, extortion, kidnapping, sodomy or treason, or who is a fugitive from justice, when armed with or having in his possession any firearm, whether or not capable of being discharged or dangerous instrument of any kind, usually known as a blackjack, sling shot, slung shot, billy, sandclub, sandbag, bludgeon, metal knuckles, dagger, dirk, dangerous knife or knife as defined in chapter 5 of the laws of 1952 (C. 2A: 151-62), razor, stiletto, cestus, or similar band studded with metal for fitting on the knuckles, loose wool imbedded with metal filings, razor blades imbedded in wood slivers, handcuffs, iron claws, grenade, bomb or other explosive or any object or device, whether toy or imitation, having an appearance similar to or capable of being mistaken for any of the foregoing, shall, in addition to the punishment provided for the crime, be punished on a first conviction by imprisonment for not less than one nor more than 10 years; upon a second conviction by imprisonment for not less than 3 nor more than 15 years; upon a third conviction by imprisonment for not less than 5 nor more than 20 years; and upon a fourth or subsequent conviction, by imprisonment for not less than 10 years nor more than for life, in the discretion of the court. No such additional punishment shall be imposed unless the indictment shall have averred that the person was armed with or had in his possession any such instrument and conviction was had thereon.

Amended by L.1959, c. 148, p. 590; §1; L.1963, c. 160, §1; L.1966, c. 60, §4.

New Jersey Court Rules, Rule 2:2-1(a) (Appeal to New Jersey Supreme Court from Final Judgments)

Rule 2:2. Appealable Judgment and Determinations

2:2-1. Appeals to the Supreme Court from Final Judgments

(a) As of Right. Appeals may be taken to the Supreme Court from final judgments as of right: (1) in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or this State; (2) in cases where there is a dissent in the Appellate Division; (3) directly from the trial courts in cases where the death penalty has been imposed and in post-conviction proceedings in such cases; (4) in such cases as are provided by law.

New Jersey Court Rules, Rule 2:12-9

2:12-9. Where Party Appeals and at the Same Time Makes Application for Certification

Where a party seeks certification to review a final judgment of the Appellate Division and also appeals therefrom, he shall state in the petition for certification all questions he intends to raise on the appeal. The denial of certification shall be deemed to be a summary dismissal of the appeal, and the Clerk of the Supreme Court shall forthwith enter an order dismissing the appeal, unless the Supreme Court otherwise orders.

New Jersey Court Rules, Rule 3:9-2 (Pleas)

3:9-2. Pleas

A defendant may plead only non vult or not guilty to an indictment for a crime punishable by death. As to all other offenses the defendant may plead only guilty or not guilty. The court in its discretion may refuse to accept a plea of non vult, or guilty, and shall not accept such plea without first addressing the defendant personally and determining by inquiry of the defendant and others, in the court's discretion, that there is a factual basis for the plea and that the plea is made voluntarily, not as the result of any threats or of any promises or inducements not disclosed on the record, and with an understanding of the nature of the charge and the consequences of the plea. For good cause shown the court may, in accepting a plea of guilty, order that such plea not be evidential in any civil proceeding. If a plea of guilty is refused, no admission made by the defendant shall be admissible in evidence against him at the trial. If a defendant refuses to plead or stands mute, or if the court refuses to accept a plea of guilty, a plea of not guilty shall be entered. Before accepting a plea of guilty the court shall require the defendant to complete, insofar as applicable, and sign the appropriate form prescribed by the Administrative Director of the Courts, which shall then be filed with the clerk of the court.

ORDER DISMISSING APPEAL OF THE SUPREME COURT OF NEW JERSEY

This matter having been duly presented to the Court, it is ORDERED that the appeal is dismissed pursuant to Rule 2:12-9.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 2nd day of May, 1978.

By: /s/ Stephen W. Townsend
STEPHEN W. TOWNSEND
Acting Clerk

ON PETITION FOR CERTIFICATION

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 2nd day of May, 1978.

By: /s/ Stephen W. Townsend

STEPHEN W. TOWNSEND
Acting Clerk

OPINION OF THE SUPERIOR COURT OF NEW JERSEY—APPELLATE DIVISION

Argued January 18, 1978—Decided February 24, 1978.

Before Judges Lora, Seidman and Milmed.

On appeal from Superior Court of New Jersey, Law Division, Essex County.

Mr. Albert L. Cohn argued the cause for appellant (Messrs. Cohn and Lifland, attorneys; Mr. Daniel Crystal on the brief).

Mr. Marc J. Friedman, Assistant Prosecutor, argued the cause for respondent (Mr. Joseph P. Lordi, Essex County Prosecutor, attorney).

PER CURIAM

Defendant, Gary F. Messina, and one Anthony Flora, Jr. were tried to a jury and convicted of murder in the first degree, conspiring to commit murder in violation of *N.J.S.A.* 2A:98-1, and possession of a pistol while committing murder, in violation of *N.J.S.A.* 2A:151-5. The trial judge sentenced defendant to the mandatory term of life imprisonment on the murder charge and merged the conspiracy charge and the armed feature of the murder with the murder conviction.

On appeal, defendant contends that the trial judge committed plain error in (1) failing to make inquiry to ascertain whether defendant fully understood the consequences of his declaration to the jury that he was guilty of both first degree murder and committing the murder with a gun, and in advising defendant to tell the jury, if he so wished, that he was guilty without determining if defendant fully understood the consequences of such admissions he was advised to make; (2) in not having had, under the circum-

stances present, an evidentiary hearing, outside the presence of the jury, to determine whether defendant was truly competent to stand trial or to cooperate with his attorney in his own proper defense; and (3) in charging the jury as to murder, in the interrelated charges concerning aiding and abetting and conspiracy, in failing to charge the jury it might find guilt as to the crime of disposing of a dead body, in charging the jury as to guilt of possesion of a revolver, in improperly emphasizing the testimony of the polygraph operator, and in erroneously referring to, and thereby giving unfair and prejudicial emphasis to a statement not before the jury.

The record shows that defendant Messina had related on direct examination that Flora had murdered Michael Amodio in the garage of the Messina home while he (Messina) was upstairs. During cross-examination, defendant asked to speak to Flora's attorney. After a recess during which Messina's attorney counselled him not to confess to the slaying, his attorney advised the trial judge that Messina wanted to plead guilty to the charges of murder and the armed feature thereof, but not to the conspiracy charge. However, since the prosecutor declined to recommend acceptance of a guilty plea unless it was as to all three counts, and since defendant's counsel recommended that defendant not so plead, the trial judge refused to accept the guilty pleas. The trial judge advised counsel in defendant's presence that his client could testify as to his guilt on the armed murder counts during the course of his testimony and the jury could determine the conspiracy charge, that the defendant had the right to say to the jury whatever he saw fit; that defendant could resume the stand, testify, and if there was admission of guilt by defendant, he would submit the issue of defendant's guilt to the jury.

Messina then resumed the stand and in the presence of the jury in answer to the prosecutor's initial question

blurted out that he would like to address the court, that he would like to plead guilty to murder and murder while armed, that there was no conspiracy involved whatsoever and that Flora was just confused.

The prosecutor then completed his cross-examination by painstakingly asking defendant questions as to how the crime was committed and for the most part, having Messina answer "yes" or "no" to questions about what happened.

Defendant bottoms his contention that the trial judge erred in not advising him of the consequences of defendant's telling the jury that he and not his co-defendant Flora had murdered Michael Amodio upon the principle that a guilty plea can not be accepted unless the court ascertains whether or not the defendant knows the nature of the charges and the consequences of the plea, see, *e.g.*, *Boykin v. Alabama*, 395 U.S. 238 (1969); *State v. Pugh*, 117 N.J. Super. 26, 36 (App. Div. 1971), *certif. den.* 60 N.J. 22 (1972), and *R.* 3:9-2.

However, defendant's reliance on cases dealing with guilty pleas is misplaced since the trial judge, pursuant to the discretion vested in him by *R.* 3:9-2, did not accept defendant's plea of guilty or *non vult*. Similarly, defendant's argument that the Rule precludes the admission into evidence of any admission made by a defendant where a plea of guilty is refused is likewise irrelevant since the record makes it clear that no admission made by the defendant during the inquiry regarding the proffered plea was used at the trial. Defendant's admission of guilt to the jury during cross-examination in no way referred to the inquiry nor was it the product of said inquiry and is therefore not within the comprehension of *R.* 3:9-2. Simply stated, this was not a plea which, if accepted, meant that defendant waived his right to a trial by jury on the issue of his guilt or innocence. Defendant was before the jury and

the jury still had to rule on the issue of defendant's guilt regardless of his self-inculpation. Under the circumstances, we are not persuaded that the trial judge was obligated to explain to the defendant the consequences of his anticipated testimony nor do we agree with defendant's assertion that the trial judge's failure to do so constituted an evasion of judicial responsibility and an abdication by the court of its special and singular function.

Defendant also asserts that he was prejudiced by the trial judge's advising him that he could admit his guilt to the murder and armed charges and leave to the jury the determination as to conspiracy. We do not construe the trial judge's remarks to defense counsel made in defendant's presence as an invitation or advice to the defendant to confess to the armed murder. The remarks constituted nothing more than a statement that defendant could admit commission of the murder before the jury if he chose to do so.

It is defendant's further contention that the trial judge erred in not conducting a hearing *sua sponte* to determine defendant's competency to stand trial or to cooperate with his attorney in his own proper defense. This contention is based upon the facts that defendant attempted to plead guilty and then confessed to the jury, lied on the witness stand, suffered great physical pain from his chronic colitis and emotional strain from having his bail revoked during trial because of a verbal altercation in the courtroom hallway in which he did not take part. Review of the record in the light of the guidelines set forth in *State v. Spivey*, 65 N.J. 21 (1974) establishes that defendant's contention is without merit. *Cf. State v. Latif*, 134 N.J. Super. 441 (1975).

Finally, defendant alleges numerous errors in the trial judge's instructions to the jury, which, conjoined with the other alleged trial errors, require reversal of defendant's

conviction. Consideration of the alleged errors and examination of them in relation to the instructions as a whole within the context of the entire record leads us to conclude there is no merit to the defendant's contention. *State v. Coleman*, 46 N.J. 16, 39 (1965). *R.* 2:11-3(e)(2).

Affirmed.

A TRUE COPY

Elizabeth McLaughlin
Clerk

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

McARTHUR CORBITT,
Defendant-Appellant.

Argued February 22, 1977—Decided October 6, 1977.

SYNOPSIS

Defendant's conviction of murder and arson was affirmed by the Superior Court, Appellate Division, and certification was granted. The Supreme Court, Conford, P. J. A. D., temporarily assigned, held that the sentencing scheme of the murder statute, whereby a person who pled non vult or nolo contendere to the charge could receive a penalty of life or not more than 30 years, while a person who was convicted of murder in the first degree by a jury would receive a mandatory life sentence, did not infringe on defendant's Fifth Amendment right to plead not guilty, or his Sixth Amendment right to jury trial, nor did it deprive defendant of equal protection.

Affirmed.

Sullivan, J., filed a dissenting opinion.

Pashman, J., filed a dissenting opinion.

1. Constitutional law –270

Homicide –351

Jury –31(11)

Sentencing scheme of murder statute, whereby person who pled non vult or nolo contendere to charge could receive penalty of life or not more than 30 years, while person who was convicted by jury would receive mandatory life sentence, did not infringe upon defendant's Fifth Amendment right to plead not guilty or his Sixth Amendment right to jury trial. *U. S. C. A. Const.* Amends. 5, 6.

2. Constitutional law –270

Sentencing scheme providing for disparity between potential penalty upon conviction and that upon plea of guilty does not infringe upon Fifth Amendment rights where the potential penalty upon conviction by jury is imprisonment rather than death penalty. *U. S. C. A. Const.* Amend. 5.

3. Constitutional law –250.3(1)

Homicide –351

Sentencing scheme of murder statute, whereby person who pled non vult or nolo contendere to charge could receive penalty of life or not more than 30 years, while person who was convicted by jury would receive mandatory life sentence, did not deny equal protection. *N. J. S. A.* 2A:113-3, 4; *U. S. C. A. Const.* Amend. 14.

4. Constitutional law –250.3(1)

In area of classification of criminal or penal offenders for purpose of penalty or punishment, Legislature may provide for differences of treatment so long as there is some rational connection between classification and proper legislative purpose. *U. S. C. A. Const.* Amend. 14.

5. Constitutional law –213.1(2)

Legislature is not required to formulate plan that seems most rational or sound to court to satisfy requirement of equal protection, but it is sufficient if any rational basis relevant to proper purpose underlies classification and attendant treatment of classes affected. *U. S. C. A. Const.* Amend. 14.

Mr. James K. Smith, Jr., Assistant Deputy Public Defender, argued the cause for appellant (*Mr. Stanley C. Van Ness*, Public Defender, attorney).

Mr. R. Benjamin Cohen, Assistant Prosecutor, argued the cause for respondent (*Mr. Joseph P. Lordi*, Essex County Prosecutor, attorney).

Mr. David S. Baime, Deputy Attorney General, argued the cause for *amicus curiae* Attorney General of New Jersey (*Mr. William F. Hyland*, Attorney General of New Jersey, attorney; *Mr. Baime* and *Ms. Jane E. Deaterly*, Deputy Attorney General, of counsel and on the brief).

Mr. Forrest R. Goodrum filed a brief on behalf of *amicus curiae* American Civil Liberties Union (*Ms. Marilyn J. Morheuser*, of counsel).

The opinion of the court was delivered by

Conford, P. J. A. D., Temporarily Assigned. At issue in this case is the constitutionality of the sentencing scheme of the New Jersey murder statute, *N. J. S. A.* 2A:113-3 and *N. J. S. A.* 2A:113-4, as judicially altered in *State v. Funicello*, 60 N.J. 60 (1972) (*"Funicello III"*), *cert. den. sub nom. New Jersey v. Presha*, 408 U.S. 942, 92 S. Ct. 2849, 33 L.Ed.2d 766 (1972). Defendant asks the Court to find: (1) that under *United States v. Jackson*, 390 U.S.

570, 88 S. Ct. 1209, 20 L.Ed.2d 138 (1968), the sentencing scheme of the act impermissibly infringes upon an accused's Fifth Amendment right not to plead guilty and his Sixth Amendment right to a jury trial; and (2) that, apart from the *Jackson* rule, the scheme deprives an accused of the equal protection of the laws.

In view of the limitation of the issues herein by our order of certification. the factual background may be capsulated. On May 11 and 13, 1972 fires occurred at a Newark multi-family dwelling. A visitor at the premises died from smoke inhalation because of the second fire. Defendant confessed to setting both fires to obtain revenge against his landlord. On April 10, 1973 a jury acquitted defendant of arson in relation to the May 11 fire but it found him guilty of arson in connection with the May 13 fire and of murder of the visitor. The murder charge had been tried on a felony murder theory. Defendant was sentenced to life imprisonment for the murder and given a concurrent five to seven year prison sentence for the arson.

On appeal the Appellate Division, in an unreported opinion, affirmed the murder conviction but vacated that for arson on grounds of merger. We granted certification but expressly "limited to the question of the validity of the mandatory life sentence upon a jury conviction for murder." 69 N.J. 447 (1976).

I

Alleged Infringement upon Fifth Amendment and Sixth Amendment Rights.

[1] The basic issue before us is whether the decision in *United States v. Jackson, supra,* which held unconstitutional the death penalty provision of the Federal Kidnapping Act under the sentencing scheme of the act, condemns as invalid our murder sentencing scheme as revised by this Court after the statute, with a provision for a death penalty, was held unconstitutional by the United States Supreme Court in *Funicello v. New Jersey,* 403 U.S. 948, 91 S. Ct. 2278, 29 L.Ed.2d 859 (1971) (*"Funicello II"*) Comprehension of the opposing views in the case requires our outlining the history of the litigation over the validity of the murder statute before and after its judicial recasting in *Funicello* III.

A

Prior to *Funicello* III our statutes [1] concerning pleading and sentencing for murder read as follows:

N. J. S. A. 2A:113-3

> In no case shall the plea of guilty be received upon any indictment for murder, and if, upon arraignment, such plea is offered, it shall be disregarded, and the plea of not guilty entered, and a jury, duly impaneled, shall try the case.
>
> Nothing herein contained shall prevent the accused from pleading non vult or nolo contendere to the indictment; the sentence to be imposed, if such plea be accepted, shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree.

N. J. S. A. 2A:113-4

> Every person convicted of murder in the first degree, his aiders, abettors, counselors and procurers, shall suffer death unless the jury shall by its verdict,

1. The Legislature has passed a bill to revise the statutes concerning murder which provides for imposition of the death penalty in certain cases. Senate No. 639. It is awaiting action by the Governor.

and as a part thereof, upon and after the consideration of all the evidence, recommend life imprisonment, in which case this and no greater punishment shall be imposed.

Every person convicted of murder in the second degree shall suffer imprisonment for not more than 30 years.

Judgments of death were pronounced under those statutes upon Leo R. Forcella and Victor R. Funicello and affirmed on direct appeal in *State v. Forcella,* 35 N.J. 168 (1961), *cert. den.* 369 U.S. 866, 82 S. Ct. 1035, 8 L.Ed.2d 86 (1962) and *State v. Funicello,* 49 N.J. 553 (1967) (*"Funicello I"*), *cert. den.* 390 U.S. 911, 88 S. Ct. 837, 19 L.Ed.2d 882 (1968). Post-conviction proceedings were brought by both, and before their final disposition the United States Supreme Court decided *United States v. Jackson, supra* 390 U.S. 570, 88 S. Ct. 1209, 20 L.Ed.2d 138.

Jackson involved a death sentence under the Federal Kidnapping Act. That statute provided that kidnapping and interstate transportation of the victim should under specified circumstances be punished by death if the verdict of the jury should so recommend or by imprisonment for any term of years or for life if the death penalty was not imposed. As the statute was construed, the death penalty could not be imposed upon a defendant who waived jury trial or pleaded guilty. The Supreme Court held the death penalty provision invalid, but severable from the remainder of the act. It reasoned that since a defendant could assuredly avoid the death penalty only by pleading guilty or proceeding to trial before a judge, he was "needlessly encourage[d]" to waive his constitutional rights not to incriminate himself, as by a plea of

guilt (Fifth Amendment) and to have a jury trial should he plead not guilty (Sixth Amendment). 390 U.S. at 583, 88 S. Ct. 1209. While recognizing the Legislature's legitimate interest in permitting a jury to mitigate the rigors of capital punishment, the Court felt that goal could not be pursued by "penalizing those defendants who plead not guilty and demand jury trial". *Id. at* 582, 88 S. Ct. at 1217. It cited state statutes which make the jury the arbiter of capital punishment no matter how the defendant's guilt is determined. *Ibid.*

Forcella, Funicello and others similarly situated brought the *Jackson* holding to the attention of the New Jersey courts in their post-conviction proceedings, arguing that it was direct authority for the invalidity of the death penalty provision in our murder statute in that only upon a trial did a defendant risk a verdict of death, not by offer and acceptance of a plea of *non vult.* Thus there existed the same needless "chilling", as in *Jackson,* of the right to contest guilt and to have a jury at the trial of the issue. In an opinion by Chief Justice Weintraub for a majority of the Court, the argument was rejected, *Jackson* being distinguished. *State v. Forcella,* 52 N.J. 263 (1968). It was pointed out that our statutory scheme differed from that in *Jackson* because a defendant could not be tried by a judge but only before a jury, and therefore the Sixth Amendment claim was without merit. *Id.* at 270-272. The purpose of the provision was "humane" and not a "needless" discouragement of the right to contest guilt, as in *Jackson,* and thus the Fifth Amendment was not offended. *Id.* at 280.

Justices Jacobs and Hall dissented. They concluded that *Jackson* compelled the elimination of the death penalty from the New Jersey sentencing scheme but that the statute could be rehabilitated by substituting life imprison-

ment therefor, without the necessity of scrapping the defendant's option to offer to plead *non vult* and be allowed the potential of a lesser penalty. 52 N.J. at 294-302.

On petition for *certiorari* the United States Supreme Court summarily, and without argument, reversed the *Forcella* holding three years later in a brief memorandum whose substantive content was confined to the statement:

> Judgment, insofar as it imposes the death sentence, reversed and case remanded to the Supreme Court of New Jersey for further proceedings. *Funicello v. New Jersey*, 403 U.S. 948, 91 S. Ct. 2278, 29 L.Ed.2d 859 (1971) (*"Funicello II"*).

The only explanation given for the ruling was the citation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L.Ed.2d 776 (1968), and similar cases [2] and of the *Jackson* case.

Upon remand to this Court, in *Funicello III, supra* (60 N.J. 60), the Court "accept[ed] the conclusion that the United States Supreme Court has declared the death penalty to be unconstitutional under our statute". *Id.* at 67. Considering the provision for the death penalty severable from the statute, the Court ordered all death sentences vacated, and it directed that all pending or future indictments for murder be prosecuted on the basis that upon the jury's verdict of murder in the first degree the penalty should be life imprisonment. Pleas to an indictment for murder were to continue to be governed by *N. J. S. A.* 2A:113-3. Id. at 67-68. In effect, the Court adopted the position of the dissenting Justices in *State v. Forcella, supra.*

2. Those cases held that a venireman in a capital case should not be excused for cause solely because he expressed opposition to the death penalty and entertained conscientious scruples against inflicting it. This was not a real issue in the New Jersey cases. See *Funicello* III (60 N.J. at 67).

The United States Supreme Court denied *certiorari* to review that determination. *New Jersey v. Presha, supra* 408 U.S. 942, 92 S. Ct. 2849, 33 L.Ed.2d 766.

Viewed in relation to the rationale of *Jackson*, the following possibly pertinent differences are apparent between the sentencing scheme under the federal kidnapping statute dealt with in *Jackson* and that of our present statute,[3] as recast by our courts: (1) there was a possibility of a death penalty after conviction under the federal act; only life imprisonment under ours; (2) the maximum punishment after conviction under the federal act was greater than that upon a plea of guilt; the maximums are the same under our act; and (3) trials by either judge or jury were available under the federal act, with the possibility of the maximum penalty (death) only when the trial was with a jury; under our statute a trial can be only by jury.

The State contends that differences (1) and (2) are each sufficient to distinguish our statute from the federal one and to justify a conclusion that ours imposes no "needless" burden on the defendant's Fifth Amendment rights, such as prohibited by *Jackson*. It also argues that difference (3) precludes the conclusion of infringement upon Sixth Amendment rights. The defendant argues that the substantial difference in potential *minimum* sentences between that upon conviction after trial and that upon a plea of *non vult* under our statute is such as to

3. References to our present statute are to be understood in the light of the recasting thereof by the Court in *Funicello* III.

render operative the rationale of *Jackson* insofar as infringement upon Fifth Amendment rights is concerned; and, moreover, that any impermissible burden on the option of the defendant to go to trial at all necessarily also burdens the Sixth Amendment right to have a jury trial.

As we view the basic underlying question posed by defendant's contention, it is whether the doctrine of *Jackson* constitutionally precludes a statutory sentencing scheme for murder wherein provision for a fixed sentence (less than death) on a conviction may co-exist with one for the taking of a plea of *non vult* (or guilt) with the possibility of the sentencing court imposing a substantially lesser sentence. The defendant responds to that question in the affirmative. He regards any substantial statutory inducement to plead rather than go to trial as *ipso facto* invalid. Our study of the cases, particularly decisions of the United States Supreme Court subsequent to *Jackson*, satisfies us that the correct conclusion is to the contrary and that our present statute is unexceptionable on either Fifth or Sixth Amendment grounds.

B

The Sixth Amendment problem need not long detain us. In *Jackson*, the right to a jury trial was implicated because trial before a judge rather than a jury assured immunity from a death sentence. If the contrast between one method of trial involving the possibility of death (jury trial) and another free from it imposes an intolerable and needless pressure on the defendant to choose the latter, as held by *Jackson*, the right of trial by jury was of course compromised.[4] But if, as under our statute, the defendant

4. Accord: *Spillers v. State*, 84 Nev. 23, 436 P.2d 18 (Sup. Ct. 1968) (rape accompanied by extreme violence and great bodily harm subject to imprisonment for not less than 20 years, or death if so declared by jury; trial by bench available on waiver by state and defendant).

is triable only by jury, if at all, no invasion of the right of jury trial, as such, is apparent. *State v. Forcella, supra*, 52 N.J. at 269-270. If, however, because of the New Jersey statutory option of a defendant to tender a plea of *non vult*, which, if accepted, has the potential of a sentence substantially less than on conviction, of first degree murder, defendant has suffered intolerable and needless discouragement of his right to go to trial at all, then defendant has necessarily suffered infringement of both his Fifth and Sixth Amendment rights. But if, on the other hand, it is concluded that whatever discouragement is involved in the scheme is not an impermissible infringement on Fifth Amendment rights, so that the provision for a plea of *non vult* is valid, the Sixth Amendment question becomes moot. The latter issue is thus determinative of the entirety of the *Jackson* phase of the case.

C

We consider, first, the merits of the State's position that the *Jackson* problem is satisfactorily resolved by the circumstance that under the statute the defendant is subject to the same maximum sentence whether he is convicted or pleads *non vult* — *i.e.*, life imprisonment. It is pointed out that under the federal kidnapping act, by contrast, the potential maximum on a plea of guilty was less than on a conviction at a jury trial. The argument is that *Jackson* emphasized the certainty of avoidance by a plea of the potential maximum after a trial. The Appellate Division has upheld the State's thesis. *State v. Hubbard*, 123 N.J. Super. 345, 351-352 (1973); *certif. den.* 63 N.J. 325 (1973); *State v. Land*, 124 N.J. Super. 303, 306 (1973). It has also so been held uniformly elsewhere. *Commonwealth v. Hargrove*, 434 Pa. 393, 254 A.2d 22 (Sup. Ct. 1969); *Sims v. Eyman*, 405 F. 2d 439 (9 Cir. 1969); *State ex rel. Strickland v. Melton*. 152 W. Va. 500, 165 S. E. 2d 90 (Sup. Ct. App. 1968); *State v. Harper*, 251 S. C. 379, 162 S. E. 2d 712 (Sup. Ct. 1968); *cf. State v. Beal*, 470

S. W. 2d 509 (Sup. Ct. Mo. 1971); *Lyons v. Howard,* 434 F.2d 632 (6 Cir. 1970); *People v. Coogler,* 71 Cal. 2d 153, 77 Cal. Rptr. 790, 454 P. 2d 686 (Sup. Ct. 1969), *cert. den.* 406 U.S. 971, 92 S. Ct. 2417, 32 L.Ed.2d 672 (1972).

We are not, however, persuaded that the point thus made is necessarily dispositive of the *Jackson* thrust. If the invariable or almost invariable practice were to accord the pleading defendant a substantially lesser sentence than that mandated on a conviction, the argument of pressure to avoid a trial by pleading guilty (aside from the other distinguishing considerations later to be discussed herein) would have logical merit even though the statute facially allowed imposition, on the taking of a plea, of the same penalty required in case of conviction after trial. See *Commonwealth v. Hargrove, supra,* 254 A. 2d at 24; *cf. Roman v. Parrish,* 328 F. Supp. 882 (E. D. Va. 1971). We need not pursue the point, however, as we are convinced, for reasons to be fully stated, that the *Jackson* case is not today authority for unconstitutionality where the maximum sentence imposable on conviction after trial is less than death; or, that if the principle is not automatically inapplicable in such a case, the New Jersey sentencing scheme is nevertheless valid notwithstanding the incidence of some encouragement or pressure on a defendant to plead guilty. We proceed with our reasons for those conclusions.

D

On its face, the opinion of the Court in *Jackson* left an ambiguity as to whether the gravamen of the holding was the overwhelmingly intimidating effect of a possible death penalty on the defendant's decision to contest his guilt or, rather, the unacceptability of any scheme which made the tender of a plea of guilt a more attractive prospect in

terms of potential punishment than taking the chance of an adverse verdict at a trial. A number of allusions in the opinion to the gravity of the defendant's dilemma support the first view: "° ° ° the defendant's assertion of the right to jury trial may cost him his life ° ° °", 390 U.S. at 572, 88 S. Ct. at 1211; "Under the Federal Kidnapping Act ° ° ° the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die. One problem is to decide whether the Constitution *permits the establishment of such a death penalty,* applicable only to those defendants who assert their right to contest their guilt before a jury." *Id.* at 581, 88 S. Ct. at 1216 (emphasis added).

On the other hand, seeming to support the necessity of exact equivalence of potential punishment under either a plea or a contest, was the Court's insistence that the evil it perceived was not that the federal statute necessarily "coerced" guilty pleas but that it "needlessly *encourage*[*d*]" them. 390 U. S. at 583, 88 S. Ct. 1209 (emphasis in the original). Thus, in responding to the Government's contention that the jury option for life imprisonment rather than death was a laudable statutory effort "to mitigate the severity of punishment", the Court said that objective could not be pursued by "penalizing those defendants who plead not guilty and demand jury trial". *Id.* at 582, 88 S. Ct. at 1217. It pointed out that the permissible objective had been constitutionally achieved in Washington and California by statutes which left the choice between life imprisonment and capital punishment to a jury in every case, regardless of how defendant's guilt had been determined. *Ibid.*

The issue for present purposes then boils down to the question whether there is a "needless" encouragement of guilty pleas in a statutory disparity between either maximum or minimum punishment on conviction and on a guilty plea when the death penalty is not involved. Dissenting in *State v. Forcella, supra,* Justices Jacobs and Hall clearly foresaw the issue we now face and answered the posed question in the negative. They concluded that the only repair of our statute required by *Jackson* was the substitution of life imprisonment for the death penalty. They disagreed with the majority, whose view it was, as expressed by Chief Justice Weintraub, that if our statute was vulnerable under *Jackson,* the indicated cure was to abolish the plea of *non vult* rather than the death penalty. 52 N.J. at 282, 283. Responding to the suggestion in the opinion of the majority that even if the death penalty were eliminated from the statute, it would still "involve a *Jackson*-type difficulty in that one who stood trial would receive a life sentence for first-degree murder while a defendant whose *non vult* plea was accepted could receive a sentence for a term of years" (52 N.J. at 282), the dissenters said (*Id.* at 300-301):

> The majority suggests that striking of the death penalty might still leave a "*Jackson*-type difficulty" in that a defendant who pleads *non vult* would receive life or a term of years whereas a defendant found guilty by a jury of first degree murder would necessarily receive life. But the jury might return a lesser verdict and, in any event, the inducement here would be insignificant when compared to the death penalty stricken in *Jackson.* The law has always been administered with pragmatic recognition of the fact that the difference between the death penalty and imprisonment entails more than matters of logic and

> degree. See *State v. Laws, supra,* 51 N.J. 494; *cf. Meszaros v. Gransamer,* 23 N.J. 179, 188 (1957); *State v. Wolf,* 46 N.J. 301, 308 (1966). *Jackson* was concerned solely with the grisly choice between a plea or waiver with an assurance of no death penalty, and a jury trial with the danger of a death penalty; it was not at all concerned with and did not mention the lesser inducements incident to the ordinary, though nonetheless troublesome, 'plea bargaining.' See Arnold, *Law Enforcement—An Attempt at Social Dissection,* 62 Yale L. J. 1 (1932); Note, *Guilty Plea Bargaining,* 112 U. Pa. L. Rev. 865, 878 (1964).

The soundness of the foregoing analysis of the parameters of *Jackson* has been fortified by subsequent decisions of the United States Supreme Court. In the first place, when *Forcella* came to be reviewed by the Supreme Court, it summarily struck the death sentences of the several petitioners. *Funicello II, supra.* Significantly, the Court did not suggest that our statute also required revision to eliminate the disparity between potential penalties on a plea of guilty and after a trial. And when our Court thereafter recast the statute in *Funicello III, supra,* the Supreme Court denied review. *New Jersey v. Presha, supra* 408 U.S. 942, 92 S. Ct. 2849, 33 L.Ed.2d 766.

Revealing light as to why the United States Supreme Court refused to disturb our statutory scheme beyond striking the death penalty is afforded by two of the opinions in the *Brady* trilogy of the Court announced May 4, 1970 (a date between the decision in *Jackson,* and the Court's ruling in *Funicello II, supra*). *Brady v. United States,* 397 U.S. 742, 90 S. Ct. 1463, 25 L.Ed.2d 747; *McMann v. Richardson,* 397 U.S. 759, 90 S. Ct. 1441, 25 L.Ed.2d 763; *Parker v. North Carolina,* 397 U.S. 790, 90 S. Ct. 1458, 25 L.Ed.2d 785.

Brady involved an attempt by a federal prisoner to be relieved of a plea of guilty under the same kidnapping statute as was involved in *Jackson*. He had faced the prospect of a possible death penalty if tried and convicted, and he urged that his plea of guilty was coerced by the same considerations which had led the Court in *Jackson* to declare the death penalty unconstitutional. The Court stated that the petitioner had "read far too much into the *Jackson* opinion". 397 U.S. at 746, 90 S. Ct. at 1468. It said that while *Jackson* prohibited the imposition of the death penalty under the kidnapping act it had not fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the previous test that guilty pleas are valid if both voluntary and intelligent. *Id.* at 747, 90 S. Ct. 1463, 25 L.Ed.2d 747. The coercive effect of the statute recognized in *Jackson* did not render the actual plea in *Brady* involuntary where it was tendered on advice of counsel and with the consciousness of the strength of the Government's case against the defendant. *Id.* at 749-750, 90 S. Ct. 1463, 25 L.Ed.2d 747.

What is of especial significance here is the Court's obvious equation in *Brady* of the trial-plea differential in potential punishment under the federal statute with precisely similar situations in plea negotiations and agreements as generally practiced and generally approved in this country.[5]

The Court stated (397 U.S. at 751, 90 S. Ct. at 1470):

> Insofar as the voluntariness of his plea is concerned, there is little to differentiate Brady from (1) the defendant, in a jurisdiction where the judge and jury

5. See *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L.Ed.2d 427 (1971); *State v. Gibson*, 68 N.J. 499 (1975); *State v. Thomas*, 61 N.J. 314, 322 (1972); *State v. Taylor*, 49 N.J. 440, 445 (1967).

> have the same range of sentencing power, who pleads guilty because his lawyer advises him that the judge will very probably be more lenient than the jury; (2) the defendant, in a jurisdiction where the judge alone has sentencing power, who is advised by counsel that the judge is normally more lenient with defendants who plead guilty than with those who go to trial; (3) the defendant who is permitted by prosecutor and judge to plead guilty to a lesser offense included in the offense charged; and (4) the defendant who pleads guilty to certain counts with the understanding that other charges will be dropped. In each of these situations, as in Brady's case, *the defendant might never plead guilty absent the possibility or certainty that the plea will result in a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty.* We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged. (emphasis added).

It is quite obvious that if defendant's present contention that the range of punishment, maximum and minimum, must constitutionally be the same on a conviction of crime after trial and upon tender and acceptance of a plea of guilty or *non vult*, a factor essential to successful plea negotiation is practically precluded from operation, *i.e.*, "the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged."

Brady, supra, 397 U.S. at 751, 90 S. Ct. at 1470. Defendant's present argument would forbid a sentencing scheme which even renders *possible* a lesser punishment on a plea of guilt than on a conviction after trial. The damage to legitimate criminal-justice-administration considerations inherent in defendant's position is clear from the *Brady* Court's demonstration of the desirability of productive plea negotiations. It said (397 U. S. at 751-752, 90 S. Ct. at 1471):

> The issue we deal with is inherent in the criminal law and its administration because guilty pleas are not constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and *because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law.* For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof. It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury. (emphasis added).

The Court concluded that acceptance of the defendant's position (397 U. S. at 753, 90 S. Ct. at 1471):

> * * * would require the States and Federal Government to forbid guilty pleas altogether, to provide a single invariable penalty for each crime defined by the statutes, or to place the sentencing function in a separate authority having no knowledge of the manner in which the conviction in each case was obtained.[6]

In the same year that *Brady* was decided, the Supreme Court rendered its opinion in *North Carolina v. Alford,* 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970). In holding that a defendant (who entered a plea of guilty to second degree murder under a North Carolina murder statute with a death penalty provision for first degree murder similar to the federal kidnapping statute involved in *Jackson*) was not entitled to withdraw his guilty plea, even where at the time he gave the plea he said he was not guilty, the Court reiterated that it was not unconstitutional for a state to adopt a procedure under which a defendant would receive a lesser penalty in exchange for a guilty plea. It said (400 U.S. at 38-39, 91 S. Ct. at 168):

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6. A holding of the Supreme Court parallel to that in *Brady* was rendered in the third of the trilogy of cases cited, *Parker v. North Carolina, supra* 397 U.S. 790, 90 S. Ct. 1458, 25 L.Ed.2d 785. The petitioner there had been indicted for first-degree burglary under a state statute which provided for the death penalty for that offense unless the jury recommended life imprisonment. If a plea of guilty was accepted the punishment would be life imprisonment. The defendant pleaded guilty and was sentenced to life imprisonment. He thereafter sought an invalidation of the plea partly on *Jackson* grounds. The court rejected the argument on the rationale of *Brady.*

> Relying on *United States v. Jackson, supra,* Alford now argues in effect that the State should not have allowed him this choice but should have insisted on proving him guilty of murder in the first degree. The States in their wisdom may take this course by statute or otherwise and may prohibit the practice of accepting pleas to lesser included offenses under any circumstances. But this is not the mandate of the Fourteenth Amendment and the Bill of Rights. The prohibitions against involuntary or unintelligent pleas should not be relaxed, but neither should an exercise in arid logic render those constitutional guarantees counter-productive and put in jeopardy the very human values they were meant to preserve.[7]

The foregoing discussion serves not only to caution against an excessively broad reading of *Jackson* because of the threat to legitimate plea negotiations, but it also demonstrates compliance of the present sentencing scheme with the *Jackson* monition that encouragement of defendants not to contest their guilt not be "needless" or "unnecessary." 390 U.S. at 582, 583, 88 S. Ct. 1209. It has been amply demonstrated above that encouragement of guilty defendants not to contest their guilt is at the very heart of an effective plea negotiation program. While one can never be certain that all defendants so encouraged are in fact guilty, our practice on acceptance of guilty or *non vult* pleas requires that the judge satisfy himself by inquiry of the defendant and others that there is a factual

7. The significance of *Brady, Parker* and *Alford* in reducing the threat of an expansive view of *Jackson* to the whole concept of plea negotiations is highlighted by the literature in relation to *Jackson* published before the decisions in *Brady* and the other cited cases. See, *e.g.*, Comment, 54 *Cornell L. Rev.* 448 (1969); Poe, "Capital Punishment Statutes In The Wake of United States v. Jackson: Some Unresolved Questions," 37 *Geo. Wash. L. Rev.* 719 (1969); "The Supreme Court, 1967 Term," 82 *Harv. L. Rev.* 63, 156 (1968); Comment, 44 *N.Y.U. L. Rev.* 612 (1969); Comment 47 *N.C. L. Rev.* 421 (1969); Note, "Discriminatory Sentencing and the Unitary Trial: Two Areas for Application of the United States v. Jackson Rationale," 31 *U. Pitt. L. Rev.* 118 (1969); Comment, 1969 *Wash. U. L. Q.* 231 (1969); Comment, 22 *Rutgers L. Rev.* 167 (1967).

basis for the plea. *R.* 3:9-2; *State v. Reali,* 26 N.J. 222 (1958). As well stated by the Chief Justice in *State v. Forcella, supra,* "[w]e should not deny a justified leniency for the many, merely to be positive that no man is needlessly encouraged not to defend." 52 N.J. at 276. The substantial benefits to the State as well as to the generality of criminal defendants, well summarized by the Supreme Court in the excerpt from *Brady,* quoted above, constitute a "need" for the encouragement of pleas of guilty within the requirement for such need laid down by *Jackson* (assuming that case survives as authority in respect of situations other than those involving the death penalty, which we strongly doubt[8]).

Nothing said hereinabove loses force by virtue of the fact that in the sentencing scheme before us a life sentence is mandatory upon a conviction of first degree murder. The present litigation is not a seminar on the pros and cons of mandatory sentencing, and our decision here implies no view of sound penological policy in the matter.[9] From the constitutional standpoint we are considering, *i.e.*, the extent of permissible encouragement of guilty pleas, there can be no objection to mandatory sentencing for prescribed offenses on conviction after trial, this being a policy matter completely within legislative discretion. *State v. Hampton,* 61 N.J. 250, 273 (1972); *People v. Broadie,* 37 N.Y.2d 100, 371 N.Y.S.2d 471, 481, 332 N.E.2d 338, 345 (Ct. App. 1975); *Commonwealth v. Jackson,* 344 N.E.2d 166, 170 (Sup. Jud. Ct. Mass. 1976); *State ex rel.*

8. There is a clear implication in *Jackson* that once the death penalty was eliminated, a viable plea negotiation potential in the recast statute was thought desirable. Responding to a Government suggestion that the federal act could be sustained by judicial elimination of all guilty pleas and waivers, the Court noted that this would require full-dress jury trials in all cases, and, "apart from the cruel impact of such a requirement upon those defendants who would greatly prefer not to contest their guilt," would "rob the criminal process of much of its flexibility." 390 U.S. at 584, 88 S. Ct. at 1218.

9. A "life sentence" is, for all practical purposes, a sentence for less than the natural life of the defendant.

Moraites v. Gorman, 322 N.E.2d 319, 320-321 (Ct. App. Ohio 1974). So much granted, the ultimate inquiry devolves to whether the juxtaposition of a potential lesser sentence on a plea of *non vult* alongside the unexceptionable mandatory life sentence on a conviction condemns the statutory scheme as a needless encouragement of the surrender of the right to defend and therefore an impermissible impingement on defendants' Fifth Amendment rights. The considerations discussed above strongly argue to the contrary.

The risks attendant upon the choice a murder defendant must make under our murder statute as to whether to defend or plead guilty are comparable to those arising from many other kinds of decisions a criminal defendant must make in the course of a prosecution. See *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L.Ed.2d 714 (1973) (more onerous verdict by a jury on a retrial after successful appeal from original conviction); *Crampton v. Ohio*, reported *sub nom. McGautha v. California*, 402 U.S. 183, 91 S. Ct. 1454, 28 L.Ed.2d 711 (1971) (dilemma of murder defendant as to whether to testify in single-trial procedure for assessment both of guilt and punishment); *Colten v. Kentucky*, 407 U.S. 104, 92 S. Ct. 1953, 32 L.Ed. 2d 584 (1972) (retrial *de novo* on appeal from inferior court with potential of greater punishment); *Brady v. United States, supra; McMann v. Richardson, supra* 397 U.S. 759, 90 S. Ct. 1441, 25 L.Ed.2d 763 (choice between challenging coerced confession at trial and pleading guilty to assure lighter sentence). "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow". *McGautha v. California, supra* 402 U.S. at 213, 91 S. Ct. at 1470. The defendant in a criminal trial "is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction." *Williams v. Florida*, 399 U.S. 78, 83, 90 S. Ct. 1893, 1897, 26 L.Ed.2d 446 (1970). If he testifies, he exposes himself to confrontation with prior criminal convictions. So too, when an accused presents witnesses at trial, he must reveal their identity and submit them to cross-examination, which, in itself, may prove incriminating or which may furnish the prosecution with strong rebuttal evidence. *Id.* at 83-84, 90 S. Ct. 1893. That the defendant faces such a dilemma "has never been thought an invasion" of his constitutional rights. *Id.* at 84, 90 S. Ct. 1897. In all of such situations, as in many similar ones, the question is whether the inherent compulsion of the defendant to make a choice impairs any constitutional right. *McGautha v. California, supra* 402 U.S. 213, 91 S. Ct. 1454. Unless the courts exercise considerable self-restraint in judging the validity of such constraints upon criminal defendants in our necessarily highly pragmatic criminal justice system, its effective operation could be intolerably prejudged.

Finally, it is our considered view that *Jackson* today is authority only for a situation where a defendant faces the prospect of a possible death sentence if convicted as against the alternative of merely a prison term if he pleads guilty. We have hereinabove stressed the language of *Jackson* emphasizing the awful pressure exerted upon a defendant whose choice of a course of action may mean his death. At the time of *Jackson*, the Court was undoubtedly already sensitive to the considerations which were to lead to the later broad invalidation of death penalties in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972). *Cf. Witherspoon v. Illinois, supra* 391 U.S. 510, 88 S. Ct. 1770, 20 L.Ed.2d 776.

As noted by the dissenting Justices in *State v. Forcella, supra*, "*Jackson* was concerned solely with the grisly choice between a plea or waiver with an assurance of no death penalty, and a jury trial with the danger of a death pen-

alty." 52 N.J. at 301. They further pointed out that "the law has always been administered with pragmatic recognition of the fact that the differences between the death penalty and imprisonment entails more than matters of logic and degree." *Id.* at 300-301. In *Furman v. Georgia* it was stated by Justice Brennan, concurring, that "[t]he calculated killing of a human being by the State involves by its very nature, a denial of the executed person's humanity." 408 U.S. at 290, 92 S. Ct. at 2752. "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S. Ct. 2978, 2992, 49 L.Ed.2d 944, 961 (1976).

[2] We believe enough has been said to demonstrate that the same Court which decided both *Jackson* and *Brady* would not strike down as infringing upon Fifth Amendment rights a sentencing scheme providing for a disparity between a potential penalty upon a conviction and that upon a plea of guilty where the former was imprisonment rather than the death penalty.

In summary of the foregoing, we conclude: (1) the authority of *Jackson* is confined to the case of a choice between trial and plea of guilt when a possible consequence of the former, and only of the former, is the death penalty; (2) alternatively, if the authority of *Jackson* goes beyond situation (1), any encouragement or inducement of a defendant to plead *non vult* under our statute and thereby waive his right to trial is not the result of a needless or unnecessary procedural device but a highly useful and desirable one, and the encouragement is therefore not an impermissible infringement of defendant's Fifth Amendment rights.

II

Alleged Denial of Equal Protection

[3] Defendant contends that the sentencing scheme of N.J.S.A. 2A:113-3, 4 has the effect of separating persons who have committed felony murder into two classes—those who go to trial and those who plead *non vult*—and of treating the former class differently and discriminatorily as to punishment without a compelling state justification for the difference in treatment. This is urged to constitute an unconstitutional denial of equal protection of the laws.

The State first counters with two preliminary responses: (1) that those indictees who plead *non vult* are pleading to a different "crime" from that of which one is convicted where, after trial, the jury returns a verdict of first-degree murder; (2) that the statute does not create differently treated classes, but, rather, merely offers all such indictees a choice, and that it is the defendant who places himself in one "class" or the other based upon his choice. We regard the second response as more semantic than substantive, and pass it. The first response is that in legal contemplation the crime identified by a conviction of first degree murder is different from the undifferentiated crime of murder, as stated in the formal indictment, which will support convictions of first or second degree murder or manslaughter. See *State v. Sullivan,* 43 N.J. 209, 241-247 (1964). Therefore, goes the argument, acceptance of a *non vult* plea constitutes conviction of a different crime from first degree murder and may be treated differently.

We do not accept the latter position as a fully satisfactory basis for meeting the defendant's argument, which, it seems to us, can and should be dealt with more directly.

We therefore pass to the State's defense of the statute on grounds more related to the merits of the equal protection attack.

[4] In the first place, we concur in the State's rejection of defendant's contention that the issue calls for application of the more exacting of the two tests for deciding an equal protection question—that of requiring the demonstration of a "compelling state interest" for the classification, as where "suspect" categories or "fundamental" rights are involved. See *Dunn v. Blumstein*, 405 U.S. 330, 342, 92 S. Ct. 995, 31 L.Ed.2d 274 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S. Ct. 1322, 22 L.Ed.2d 600 (1969); *State v. Chambers*, 63 N.J. 287, 296 (1973); *State v. Costello*, 59 N.J. 334, 345-346 (1971) (both of the latter cases involving penological classification based on the suspect category of sex). In this State, however, where the Legislature has created classifications of offenders for purposes of fixing penalty, the courts have continued (absent use of suspect criteria such as race or sex) to apply the traditional "rational relationship" test. *State v. Fearick*, 69 N.J. 32, 38 (1976); *State v. Smith*, 58 N.J. 202, 206-207 (1971). *State in Interest of K.V.N.*, 116 N.J. Super. 580, 589 (App. Div. 1971), *aff'd o. b.* 60 N.J. 517 (1972). These cases stand for the proposition that in the area of classification of criminal or penal offenders for purposes of penalty or punishment the Legislature may provide for differences of treatment so long as there is some rational connection between the classification and a proper legislative purpose.

If, therefore, defendant is right in asserting that murder indictees who contest guilt by trial and are convicted of first degree murder and those whose *non vult* pleas are accepted by the court are constituted separate classes by the statute, the question as to whether that classification, in the light of the different minimum punishments prescribed

for each class is valid, becomes an inquiry as to whether there is a proper legislative purpose to which the classification is rationally related. This inquiry, we are clear, must be resolved in the affirmative. There are several such purposes. The first is the humane and rehabilitative one of ameliorating the rigor of life imprisonment for those offenders who are willing to acknowledge their crime. *State v. Poteet*, 61 N.J. 493, 496 (1972); *State v. Forcella*, *supra* (52 N.J. at 275, 299-300). Other such purposes are fully developed in Part I of this opinion where they are cited to demonstrate that any encouragement in our statutory scheme to murder indictees to plead *non vult* is "needed" and not "unnecessary", within Fifth Amendment criteria and considerations. These purposes include the facilitation of plea negotiations in homicide cases, necessary to achieve flexibility and efficiency as well as justice in criminal justice administration; the conservation of scarce judicial and prosecutorial resources for those cases cases which properly require trial; and the prompter imposition of punishment on acknowledged offenders. See *Brady v. United States*, *supra* 397 U.S. at 752, 90 S. Ct. 1463.

[5] All of the foregoing presumptive legislative purposes are, to say the least, rationally connected with the difference in potential minimum penalties respectively imposable upon conviction of first degree murder and upon acceptance by the court of a *non vult* plea to a charge of murder.[10] That such purposes, arguably, could be served more wisely were there a more flexible range of punishments on conviction for first degee murder than the life imprisonment now mandated is irrelevant, for equal protection purposes. The Legislature is not required to formulate the plan that seems most rational or sound to the

10. It might well be argued that such purposes even amount to a "compelling state need", were it legally necessary to meet that equal protection test.

court. It is sufficient if *any* rational basis relevant to a proper purpose underlies the classification and the attendant treatment of the classes affected. *State v. Smith*, 58 N.J. 202, 206-207 (1971); *State v. DeStasio*, 49 N.J. 247, 260 (1967), *cert. den.* 389 U.S. 830, 88 S. Ct. 96, 19 L.Ed. 2d 89 (1967); *State v. Wingler*, 25 N.J. 161, 175-176 (1957).

We conclude the equal protection attack upon the statutory scheme is without merit.

Judgment affirmed.

SULLIVAN, J. (dissenting). I find myself unable to agree with the reasoning and conclusion in the majority opinion. Plainly stated, the statutory sentencing scheme before us provides that if a defendant who is indicted for murder exercises his right to stand trial by jury and is convicted of murder in the first degree he must receive a sentence of life imprisonment. However, if he pleads *non vult* to the same indictment, he becomes eligible to receive a sentence for any term of years not exceeding 30 years and even have such sentence suspended. *N.J.S.A.* 2A:168-1.

The majority opinion states that the issue is whether this scheme results in the "needless encouragement" of guilty pleas. It is that in part, but of equal importance, here it penalized a defendant who exercised his right to stand trial. For that he had a mandatory sentence of life imprisonment imposed on him. I agree with the late Chief Justice Weintraub that such a sentencing scheme would and does present "a *Jackson*-type difficulty[11] in that one who stood trial would receive a life sentence for first-degree murder while a defendant whose *non vult* plea was accepted could receive a sentence for a term of years." *State v. Forcella*, 52 N.J. 263, 282 (1968).

11. *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L.Ed.2d 138 (1968).

Various alternatives would be constitutionally permissible. One would be to abolish the *non vult* plea to the indictment and instead provide that a defendant would not be permitted to plead guilty to murder in the first degree but only to second degree murder. Also, the mandatory sentence of life imprisonment for first degree murder could be changed so as to vest discretion in the sentencing judge. This latter solution would appear to be the more desirable because mandatory sentences, while they have been held to pass constitutional muster, bar a sentencing judge from taking into account facts and circumstances which otherwise might properly be relevant in fixing sentence.

The majority opinion holds that the separate classification for sentencing purposes of those who plead *non vult* to murder and those who choose to stand trial has a rational purpose akin to our system of plea negotiations. I see a substantial difference. Plea negotiations as noted in the majority opinion legitimately take into account a guilty defendant's willingness to admit such guilt and thereby conserve judicial and prosecutorial resources. A sentencing judge, in his discretion, may take such a plea of guilt into consideration in fixing the degree of punishment. However, a sentencing scheme which presents the threat of penalizing a defendant because he pleads not guilty and demands a jury trial, is not the same thing.

I am concerned about a defendant who pleads *non vult* to an indictment for murder in order to avoid the risk of a mandatory life sentence if he stands trial. I am equally concerned about a defendant who exercises his constitutional right to stand trial on the same indictment and because he does so, as here, now faces a mandatory life sentence. To me, in addition to presenting a *Jackson*-type difficulty, this involves a denial of equal protection of the laws.

I would invalidate the mandatory life sentence provision of the statute, vacate the life sentence imposed on defendant and remand the matter to the trial court for resentencing with the trial judge to exercise such discretion as the circumstances warrant.

Pashman, J., dissenting. The majority today holds that a defendant may be denied the opportunity to receive a reduced sentence *solely* because he exercised his constitutional right to have his guilt determined by a jury of his peers. It now holds that a person who stands trial and is convicted will receive a mandatory life sentence even though that same individual might have been eligible for a suspended sentence if he had admitted his guilt and waived his rights. I believe that this decision calls into question some of our most basic constitutional guarantees, including a person's right to a jury trial, *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L.Ed.2d 491 (1968), to confront one's accusers. *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L.Ed.2d 923 (1965), to present witnesses in one's defense, *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L.Ed.2d 1019 (1967), to remain silent, *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L.Ed.2d 653 (1964), and to be convicted by proof beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). The price tag which today's decision places on the exercise of such rights stands in stark contrast to the protections which they have traditionally enjoyed. Accordingly, I respectfully dissent.

I

A

The statutory scheme which gives rise to today's decision makes sentencing of persons charged with murder depend upon whether or not they exercise their constitutional right to go to trial. The sentencing procedure provides that if a defendant who is indicted for murder exercises his right to go to trial and is convicted of murder in the first degree, he *must* receive life imprisonment. If he pleads *non vult* to the same indictment, he *may* receive a suspended sentence or any term not exceeding 30 years. *State v. Funicello*, 60 N.J. 60, 68 (1972).

This unfair result contradicts the numerous cases holding that the sentence imposed on a criminal defendant may not depend upon whether he has exercised his right to trial. *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L.Ed.2d 138 (1968); *Pope v. United States*, 392 U.S. 651, 88 S. Ct. 2145, 20 L.Ed.2d 1317 (1968); *United States v. Derrick*, 519 F.2d 1, 3 (6 Cir. 1975) ("it is improper for a district judge to penalize a defendant for exercising his constitutional right to plead not guilty and go to trial, no matter how overwhelming the evidence of his guilt"); *Voyles v. Thorneycroft*, 398 F. Supp. 706 (D. Ariz. 1975); *People v. Young*, 20 Ill. App. 3d 891, 314 N.E.2d 280 (1974). In *Hess v. United States*, 496 F.2d 936 (8 Cir. 1974), the Eighth Circuit noted that it was joining "a host of other courts in recognizing that whether a defendant exercises his constitutional right to trial by jury to determine his guilt or innocence must have no bearing on the sentence imposed," 496 F.2d at 938, citing in support of this proposition: *United States v. Marzette*, 485 F.2d 207 (8 Cir. 1973); *United States v. Stockwell*, 472 F.2d 1186 (9 Cir.), *cert. den.* 411 U.S. 948, 93 S. Ct. 1924, 36 L.Ed.2d 409 (1973); *United States v. Hopkins*, 150 U.S. App. D.C. 307, 464 F.2d 816, 822 (1972); *Scott v. United States*, 135 U.S. App. D.C. 377, 419 F.2d 264, 269-74 (1969); *Baker v. United States*, 412 F.2d 1069, 1073 (5 Cir. 1969), *cert. den.* 396 U.S. 1018, 90 S. Ct. 583, 24

L.Ed.2d 509 (1970); *United States v. Wiley*, 278 F.2d 500, 504 (7 Cir. 1960).[12]

In *United States v. Jackson*, *supra*, the United States Supreme Court considered a sentencing scheme similar to the instant one, although admittedly under it the potential consequences of asserting one's right to trial were substantially more severe. The challenged statute, 18 U.S.C. §1201(a), permitted a defendant to be sentenced to the death penalty only upon a jury recommendation of that sanction. Thus, the death penalty could only be imposed where the defendant pleaded not guilty and unsuccessfully exercised his right to a trial. In holding the statute unconstitutional, the Court clearly indicated that *any* statute which operates to chill the exercise of a defendant's constitutional rights must be invalidated. Mr. Justice Stewart wrote for the Court:

> Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury. The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. *If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional.* [390 U.S. at 581, 88 S. Ct. at 1216, 20 L.Ed.2d at 147; footnote omitted; emphasis added]

12. This principle is not foreign to our own Court. The statement was made in *State v. De Stasio*, 49 N.J. 247, 259 (1967), *cert. den.* 389 U.S. 830, 88 S. Ct. 96, 19 L.Ed.2d 89 (1967), that "a sentence may not be increased because a defendant defended against the charge. . . ." It was also repeated approvingly in *State v. Gibson*, 68 N.J. 499, 510 (1975) and *State v. Poteet*, 61 N.J. 493, 496 (1972), *habeas corpus* granted *sub nom. Poteet v. Fauver*, 517 F.2d 393 (3 Cir. 1975).

Contrary to the notion of today's majority, the Supreme Court's decision was not grounded on the theory that a defendant's rights were "chilled" only in a situation where a conviction by a jury resulted in the mandatory imposition of a more severe penalty than that which could have been imposed upon a plea. The statute involved in *Jackson*, as well as those in *Pope v. United States*, *supra*, and *Funicello v. New Jersey*, 403 U.S. 948, 91 S. Ct. 2278, 29 L.Ed. 2d 859 (1971), made it possible for a defendant who had been convicted by a jury to receive precisely the same lesser sentence which could have been imposed had he pleaded guilty. Unlike the situation presented in this case with respect to life imprisonment, the death penalty was not the mandatory sentence upon such conviction. Rather, it is obvious that the Court felt that the *mere possibility* of a more severe sentence resulting from a jury trial chilled a defendant's exercise of his constitutional rights.

B

The majority, however, argues that the Court's opinion in *Jackson* is distinguishable for two reasons: (1) the possibility of the death sentence in that case was far more coercive than the threat of life imprisonment involved here, and (2) there the defendant could have received a more severe sentence by going to trial while here he is merely eligible to receive a less severe sentence if he pleads *non vult*. See *ante* at 389-391. Despite the acknowledgement that express language in *Jackson* seems to contradict either attempt at distinguishing the present scheme, the majority apparently embraces the first rationale as a means of circumventing the *Jackson* result. *Id.* at 391, quoting with approval, *State v. Forcella*, 52 N.J. 263, 300-01 (1968) (Jacobs Hall, J.J., dissenting). See also *ante* at 399 [of 74 N.J.].

This emphasis on the fact that *Jackson* involved a sentencing scheme utilizing the death penalty is the basis of

the majority's untenable assertion that a statute must actually *coerce* a defendant into pleading guilty in order to be constitutionally defective.

Yet as the majority itself recognizes, see *ante* at 390, the Court's opinion in *Jackson* specifically noted that such coercion was not a necessary element of an impermissible calling of a defendant's exercise of his constitutional rights. The court reasoned that

> the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right. Thus the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily. [390 U.S. at 583, 88 S. Ct. at 1217, 20 L.Ed.2d at 148; emphasis in original]

Elsewhere in the opinion the Court stated that "Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right." 390 U.S. at 583, 88 S. Ct. at 1217, 20 L.Ed.2d at 147.

Additional light is shed on the Court's meaning in using the phrases "needlessly encourages" or "penalizes the assertion of a constitutional right" by reference to *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L.Ed.2d 106 (1965). The Court there held that allowing critical comment at trial concerning the accused's failure to take the stand in his own defense violated the Fifth Amendment privilege against self-incrimination. In language similar

to that used in *Jackson*, the Court ruled that such conduct amounted to "a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U.S. at 614, 85 S. Ct. at 1232, 14 L.Ed.2d at 109-10.

Hence, it is incontrovertible that *Jackson* and *Griffin* prohibit *any* governmental action which "needlessly encourages" a defendant's waiver of his constitutional rights or makes the assertion of those rights more "costly." *Griffin* precludes any argument that such an illegal "encouragement" comes only from the threat of the death penalty,[13] or that the constitutional infirmity would be cured if the "penalty" for going to trial could also be imposed upon a plea of *non vult*.[14]

Nor are *Jackson* and *Griffin* aberrations. They are wholly consistent with a line of authority holding that government may not unduly burden the exercise of constitutional rights. This same rationale was expressed by the Court in *Malloy v. Hogan*, *supra*, the seminal decision holding that

13. In *United States v. McCoy*, 139 U.S. App. D.C. 60, 429 F.2d 739 (1970) the Court applied the *Jackson* principle to a penalty of life imprisonment. At sentencing, the trial judge had informed the defendant that "anyone else who was convicted by a jury before me of Armed Robbery would receive a life sentence." 139 U.S. App. D.C. at 64, 429 F.2d at 743. Although reversing the conviction on other grounds, the Court noted that despite the defendant's lack of awareness of this judicial policy when he elected to exercise his right to trial:

> '[the] inevitable effect of any such provision is * * * to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial.' *United States v. Jackson*, 390 U.S. 570, 581, 88 S. Ct. 1209, 1216, 20 L.Ed.2d 138 (1968) (footnote omitted). [*Id.* at 743]

14. The majority concludes that *Jackson* emphasized the fact that the only way to avoid the "penalty" was by waiving one's right to go to trial. See *ante* at 388. Thus, it would hold that since a defendant may receive a life sentence under the present scheme, whether or not he goes to trial, there is no constitutional impediment. However, this reasoning substitutes for the Supreme Court's clear-cut test—whether or not the scheme "needlessly encourages" guilty pleas—a new hyper-technical distinction. As I have already stated, under several statutes which the Supreme Court struck down, a defendant could receive the same sentence whether or not he pleaded guilty. I see no reason to conclude that the instant statute is any less of an encouragement to plead *non vult* than any of those. *See United States v. McCoy, supra.*

the Fifth Amendment privilege against self-incrimination was applicable to the States through the Fourteenth Amendment. Mr. Justice Brennan, speaking for the Court, concluded that the privilege secures "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." 378 U.S. at 8, 84 S. Ct. at 1493, 12 L.Ed.2d at 659. The Court's opinion reinforces the theme enunciated in *Jackson*—that any needless encouragement to waive one's constitutional rights is tantamount to unconstitutional penalty:

> Under this test, the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was "free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . ." * * * In other words the person must not have been compelled to incriminate himself. We have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed, *Haynes v. Washington*, 373 U.S. 503, 83 S. Ct. 1336, 10 L.Ed.2d 513 [378 U.S. at 7, 84 S. Ct. at 1493, 12 L.Ed.2d at 659; citations omitted]

Other decisions cited by the Court in *Malloy, supra,* support this same unswerving tradition of rigorously assuring that a person's waiver of his constitutional rights is not tainted by governmental misconduct. *But see Smith v. United States*, 348 U.S. 147, 150, 75 S. Ct. 194, 99 L.Ed. 192, 197 (1954); *Ziang Sung Wan v. United States*, 266 U.S. 1, 14, 45 S. Ct. 1, 69 L.Ed. 131, 148 (1924); *Hardy*

v. United States, 186 U.S. 224, 229, 22 S. Ct. 889, 46 L.Ed. 1137, 1140 (1907); *Bram v. United States*, 168 U.S. 532, 542–43, 18 S. Ct. 183, 42 L.Ed. 568, 573 (1897).

C

The only question then is whether the governmental action in the present case "needlessly encourages" a defendant to waive his constitutional rights or makes the assertion of those rights more "costly." Clearly, this question must be answered in the affirmative, particularly when the present statutory scheme is measured against the evil perceived in *Griffin* or *Haynes v. Washington, supra.* Surely the threat here—the heightened possibility of a sentence of life imprisonment after trial—would have a far greater effect on a defendant's decision to waive his rights than either the possibility that a prosecutor will comment adversely on an accused's failure to testify at trial, as in *Griffin*, or the refusal to allow a person to speak with his wife until he confessed, as in *Haynes.*

The present statute is quite similar to the situation addressed by the Court in *Scott v. United States, supra.* The trial judge had told the defendant there that "[i]f you had pleaded guilty to this offense, I might have been more lenient with you." On appeal, Judge Bazelon concluded that "[t]he stark import of this comment [was] that the defendant paid a price for demanding a trial." 135 U.S. App. D.C. at 382, 419 F.2d at 269 [footnotes omitted]. After observing that the United States Supreme Court had held that the assertion of Fourth, Fifth and Sixth Amendment rights may not be made more costly by a differential sentencing policy which "exact[s] a price from those who insist upon a trial," he concluded that such an announced policy taints sentencing with impermissible considerations which make a defendant a "pawn sacrificed to induce other defendants to plead guilty." 135 U.S. App. D.C. at

383, 385, 419 F.2d at 270, 272. *See also United States v. McCoy, supra* at 743.

The present statute burdens the exercise of a defendant's rights even more onerously. By formalizing in a statute the disparity between sentences for pleas of not guilty and *non vult*, the State heightens the possibility that a defendant will be induced to plead to a charge.

D

I find little to persuade me of the merit of the majority's position in the three cases which it cites: *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970); *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L.Ed.2d 747 (1970); Parker v. North Carolina, 397 U.S. 790, 90 S. Ct. 1458, 25 L.Ed.2d 785 (1970). These cases addressed only the issue of permissible grounds for withdrawal of a guilty plea which was obtained under an unconstitutional scheme. They are of little help in determining whether a statutory scheme itself is constitutional.

Contrary to the majority's assumption, these cases do not represent an erosion of the *Jackson* principle. The basis for the Supreme Court's opinions in the three cases was foreshadowed in *Jackson* when the Court stated that

> the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily. [390 U.S. at 583, 88 S. Ct. at 1217, 20 L.Ed.2d at 148; footnote omitted]

Thus, the Court was able to say in *Brady v. United States, supra*, that *Jackson*

> neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test theretofore fashioned by courts and since reiterated that guilty pleas are valid if both "voluntary" and "intelligent." [397 U.S. at 747, 90 S. Ct. at 1468, 25 L.Ed.2d at 756]

In a footnote the Court added that "[t]he requirement that a plea of guilty must be intelligent and voluntary to be valid has long been recognized." *Id.*, n.4. Hence, I do not regard these largely irrelevant cases as an endorsement of our current sentencing plan. They are solely concerned with the standard to be applied when a defendant seeks to withdraw a guilty plea. The Supreme Court has indicated that a more stringent burden applies in the latter situation than when attacking the constitutionality of a sentence. Such a result is in keeping with the extreme importance which the Court has consistently placed on the finality of a plea. *See McMann v. Richardson*, 397 U.S. 759, 774, 90 S. Ct. 1441, 1450, 25 L.Ed.2d 763, 775 (1970)(decided the same day as *Brady* and *Parker v. North Carolina*)("interests in maintaining the finality of guilty plea convictions" warrant judging plea under law existing when plea given); *Tollett v. Henderson*, 411 U.S. 258, 93 S. Ct. 1602, 36 L.Ed.2d 235 (1973)(guilty plea may not be withdrawn although given following an indictment by an unconstitutionally selected grand jury).

Notwithstanding the inapposition of these cases, the majority goes beyond the strict holdings in *North Carolina v. Alford, Brady* and *Parker v. North Carolina* and finds comfort in *dicta* in those cases referring to the propriety of plea negotiations or bargaining. Equating the present sentencing arrangement with other choices a defendant must make in the course of a trial, it concludes that the "needless encouragement" referred to in *Jackson* only applies to a situation in which the death penalty is involved. See *ante* at 397 [of 74 N.J.].

Contrary to the conclusion which the majority derives from the dicta in this trilogy of cases, I regard their language to be relevant only insofar as it confirms an otherwise obvious conclusion: that inducements which are implicit in the criminal justice system itself provide an insufficient basis for prohibiting guilty pleas in general. Thus, it would be frivolous for a defendant to attempt to withdraw a guilty plea because he was induced to admit his guilt by a desire to appease his conscience, or spare his family the anguish or expense of enduring a trial, or even to convince the sentencing judge that his admission of culpability was indicative of his capacity for being reformed. However, I regard the considerations which must inevitably weigh upon a defendant's mind under the present sentencing scheme as being fundamentally distinguishable. The heightened possibility of a life sentence exerts a more coercive pressure on a person's mind than any of the other "inducements" mentioned by the majority. Furthermore, it can in no way be considered necessarily incidental to our system of justice.

I consider plea bargaining to involve entirely distinguishable considerations. Although both the Court's interpretation of the present statute and a plea bargain involve an inducement in that a defendant can receive a lesser sentence, only the former contemplates imposing a penalty for failing to plead guilty. For instance, it is settled that the State could not induce a plea by threatening that the sentencing judge would decline to consider mitigating circumstances if the defendant refuses to accept a bargain. *See generally Santobello v. New York*, 404 U.S. 257, 265-66, 92 S. Ct. 495, 30 L.Ed.2d 427, 434-35 (Douglas, J., concurring) (1971); *Scott v. United States, supra*, 135 U.S. App. D.C. at 387, 419 F.2d at 274 (court may not "create incentives for guilty pleas [in the bargaining process] by a policy of differential sentences"). Furthermore, where a person rejects a bargain, the State may not use that fact as a ground for preventing him from exercising the right to appeal his sentence on the ground that it was excessive. *Cf. State v. Gibson, supra.* Yet these are precisely the type of penalties which today's result mandates.[15]

Moreover, it is doubtful whether a court would ever accept a plea bargain under the circumstances created by this scheme. As Mr. Justice Mountain stated in *State v. Thomas*, 61 N.J. 314 (1972), "[i]f plea bargaining is to fulfill its intended purpose, it must be conducted fairly on both sides and the results must not disappoint the reasonable expectations of either." 61 N.J. at 321. The necessary corollary of such a holding is that a bargain may be enforced only if the defendant is "fully aware of the direct consequences [of his plea], including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, . . ." *Brady v. United States, supra*, 397 U.S. at 756, 90 S. Ct. at 1472, 25 L.Ed.2d at 760, quoting approvingly from *Shelton v. United States*, 246 F.2d 571, 572, n. 2 (5 Cir. 1957) (*en banc*), rev'd on confession of error on other grounds, 356 U.S. 26, 78

15. One commentary has noted that

> courts appear to make the distinction that a defendant cannot be *forced* to *pay* for exercising a constitutionally granted right, yet he cannot be heard to complain if he voluntarily *receives* a concession for waiving the right. If the accused is exposed to a greater risk for asserting a right, then he is being encouraged not to exercise his legal and constitutional prerogatives and is possibly deprived of the ability to freely weigh the alternatives. Nevertheless, the decision to plead guilty to a lesser sentence and avoid the risk of either a conviction on more serious charges or a more severe sentence is held voluntary.
>
> [Note, "The Legitimation of Plea Bargaining: Remedies for Broken Promises," 11 *The American Criminal Law Review* 771, 777 (1973); footnotes omitted; emphasis in original]

It then went on to apply this reasoning, concluding that this distinction explains the "contrasting judicial treatment of differential sentencing and plea bargaining. Differential sentencing is generally unacceptable: any announced judicial policy whereby a defendant who is convicted by trial will be sentenced more harshly than if he pleads guilty, is a denial of due process of law." *Id.*

S. Ct. 563, 2 L.Ed.2d 579 (1958). *See also State v. Gibson, supra*, 68 N.J. at 518 (Schreiber, J., concurring). Under today's holding a defendant who pleads *non vult* to avoid running the risk of a conviction after trial is not only deprived of the benefit of a reduction in charges, but is told only that he will receive a sentence varying anywhere from probation to life imprisonment. While such a defendant knows that the sentencing judge is now in a position to consider mitigating factors, he cannot be assured of the result of his plea or even of the weight which will be accorded those factors. A defendant in this uncertain position cannot be said to be "fully aware of the direct consequences of his plea." In fact, contrary to the theory that the sentence in this case can be upheld on the basis of an analogy to plea bargaining, this state of affairs typifies the "pleading in the dark" which has led various courts to place stricter limits on the bargaining process.[16] *See* Gallagher, "Judicial Participation in Plea Bargaining: A Search for New Standards," 9 *Harv. Civ. Rights-Civ. Lib. L. Rev.* 29, 33 (1974).

I believe that plea bargains serve certain legitimate functions which distinguish them from sentencing under the scheme in question. Such negotiations allow a prosecutor to offer leniency in exchange for assistance or testimony which is necessary in other cases, *State v. Taylor*, 49 N.J. 440, 455 (1967), and enable him to fully carry out the charging function vested in his office. *Cf. State v. Leonardis*, 73 N.J. 360, 379, n. 9 (1977). On the other hand, the statute in question appears to have the single purpose of encouraging people to plead *non vult*. Such a purpose is impermissible under our Constitution, and

16. Any such holding would render ludicrous the corollary requirement that the terms of a bargain be carried out. *Santobello v. New York, supra; State v. Brown*, 71 N.J. 578 (1976); *State v. Jones*, 66 N.J. 524, 525-26 (1975).

I would thus hold that this scheme is unconstitutional. I believe that we are bound in this regard by the United States Supreme Court's mandate in *Jackson* that if a "provision [has] no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional." 390 U.S. at 581, 88 S. Ct. at 1216, 20 L.Ed.2d at 147.

II

My conclusion that this scheme has only one purpose —to chill the assertion of an accused's constitutional rights —impels me to conclude that it is also violative of defendant's right to equal protection of the laws under the Fourteenth Amendment. Even if the majority is correct in assuming that a sentencing scheme which provides for disparate sentencing may be upheld merely upon a showing of its *rational* relationship to some legitimate state object,[17] I fail to see any legitimate state purpose served by this plan.

The requirement that any legislative enactment must serve some legitimate state objective has been stated throughout the opinions of this Court and the United States Supreme Court. *See, e.g., Dunn v. Blumstein*, 405

17. Recently this Court held that a scheme which results in disparate sentencing is inherently suspect and must be supported by a compelling state interest. Mr. Justice Sullivan wrote for a unanimous Court in *State v. Chambers*, 63 N.J. 287 (1973):

> Generally, legislative selection of a class for special treatment can be justified where there is some rational basis between the classification and the object sought to be achieved. However, certain classifications by their very nature are inherently suspect and will be subjected to close judicial scrutiny as to whether a fundamental constitutional right is being impaired. * * * [63 N.J. at 295-96]

In striking down a disparate sentencing scheme based solely upon sex, the Court noted that it was concerned in that case with "confinement in a penal institution—a restraint on one's liberty, one of the most basic human rights." *Id.*

U.S. 330, 92 S. Ct. 995, 31 L.Ed.2d 274 (1972); *Lindsey v. Normet*, 405 U.S. 56, 70, 92 S. Ct. 862, 31 L.Ed.2d 36, 48 (1972); *State v. Fearick*, 69 N.J. 32, 38 (1976); *State v. Smith*, 58 N.J. 202, 207 (1971).

The first reason propounded by the majority for upholding the present scheme is, in its words, the

> humane and rehabilitative one of ameliorating the rigor of life imprisonment for those offenders who are willing to acknowledge their crime. [*Ante* at 402]

Such an exercise in circular logic tells us nothing. If the sole reason for offering a reduced sentence is that it serves humanitarian and rehabilitative functions, there is no reason why these same goals would not apply with equal force to defendants who choose, as they are constitutionally entitled, to have their guilt determined by a judge and jury. As eloquently stated by Judge Bazelon in *Scott*, *supra:*

> Repentance has a role in penology. But the premise of our criminal jurisprudence has always been that the time for repentance comes after trial. The adversary process is a fact-finding engine, not a drama of contrition in which a prejudged defendant is expected to knit up his lacerated bonds to society.
>
> There is a tension between the right of the accused to assert his innocence and the interest of society in his repentance. But we could consider resolving this conflict in favor of the latter interest only if the trial offered an unparalleled opportunity to test the repentance of the accused. It does not. There is other, and, better, evidence of such repentance. The sort of information collected in pre-sentence reports provides a far more finely brushed portrait of the man than do a few hours or days at trial. And the offender while on probation or in prison after trial can demonstrate his insight into his problems far better than at trial.
>
> If the defendant were unaware that a proper display of remorse might affect his sentence, his willingness to admit the crime might offer the sentencing judge some guidance. But with the inducement of a lighter sentence dangled before him, the sincerity of any cries of *mea culpa* becomes questionable. Moreover, the refusal of a defendant to plead guilty is not necessarily indicative of a lack of repentance. A man may regret his crime but wish desperately to avoid the stigma of a criminal conviction. [135 U.S. App. D.C. at 383, 384, 419 F.2d at 270-1; footnote omitted]

The second reason offered by the majority for upholding the scheme is its asserted promotion of "flexibility and efficiency as well as justice in criminal justice administration." The third reason is simply a restatement of this: the conservation of "scarce judicial and prosecutorial resources for those cases which properly require trial." Taken together, these statements may be read to mean that our basic constitutional rights are not worth the time that we spend on them, and that a case is not really worth trying unless a defendant is willing to test his innocence against the possibility of a stiffer sentence if he is found guilty. Using the risk of life imprisonment as an incentive to ensure a vigorous trial contest seems unduly harsh at best and rather atavistic at worst. I can only conclude that the goals cited in support of the sentencing scheme fail to provide a legitimate state objective. They merely provide a pretext for further eroding our constitutional guarantees, an end which I regard as wholly illegitimate.

The final justification which the majority offers in support of the scheme is that it results in "prompter imposition of punishment on acknowledged offenders." Yet the folly in this bit of logic is that by upholding the scheme, we risk coercing a person into becoming an "acknowledged offender." While I am certainly in favor of reducing delays in our criminal justice system, I do not believe that we have a legitimate interest in discouraging persons from going to trial in order to be able to impose punishment more quickly.

III

In spite of our long held beliefs that the constitutional guarantees associated with the right to a trial were available to *all* persons, we are now told that only those who are confident of victory should dare assert that right by going to trial. The possibility of a mandatory life sentence, with no hope for relief on appeal, will surely sober any defendant who naively believes, as a result of a fair reading of the Bill of Rights, that he was free to exercise unfettered discretion in determining whether to demand that the State prove his guilt before a judge and jury.

This unfortunate result conflicts with an unbroken line of cases by the United States Supreme Court striking down governmental attempts to induce a person to waive his rights. In one stroke of the judicial pen the majority emasculates that Court's decisions in *Jackson* and *Griffin*, and undermines the firm foundation upon which those holdings rested. Thus I regard today's decision as a significant break with precedents of the Supreme Court setting forth minimum standards for protecting the important constitutional guarantees involved in this decision.

Finally, I note that the constitutional safeguards involved in this case—the right to a jury of one's peers, to

confront one's accusers, to present witnesses in one's defense, to remain silent, and to have the State prove one's guilt beyond a reasonable doubt—are the virtual touchstones of the American criminal trial. By discouraging defendants from availing themselves of the protections which our Constitution offers, we undermine the basic values which form the core of our democratic system.

I respectfully dissent. The life sentence imposed on the defendant should be vacated. I would remand to the trial court for resentencing in accordance with this opinion.

For affirmance—Chief Justice HUGHES, Justices MOUNTAIN, CLIFFORD and SCHREIBER and Judge CONFORD—5.

For remandment—Justices SULLIVAN and PASHMAN—2.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-127

GARY MESSINA,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

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STATE OF NEW JERSEY, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

Opinion Below

The Superior Court of New Jersey, Appellate Division, affirmed the Petitioner's conviction on February 24, 1978, in an unreported opinion (Pa11). The New Jersey Supreme Court denied a subsequent Petition for Certification on May 2, 1978. *State* v. *Messina,* —— N.J. ——, —— A.2d —— (1978).

Jurisdiction

The Court has jurisdiction to consider this matter pursuant to 28 U.S.C.A. §1257(3).

Questions Presented

1. Whether a trial court has an obligation to caution a testifying defendant, represented by counsel, about the consequences of his confessing to the offense before the jury.

2. Whether this case is a proper one for consolidation with *Corbitt* v. *New Jersey*, prob. juris. noted 46 U.S.L.W. 3526 (1978).

Statute Involved

This matter involves the question of whether the Petitioner was denied a fair trial under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. It is alleged that before the Petitioner admitted his guilt during cross-examination before the jury, he should have been warned by the trial court of the consequences of such action.

This matter also involves the constitutionality of the sentencing scheme of the New Jersey murder statutes, N.J.S.A. 2A:113-1, 2, 3 and 4, as judicially altered in *State* v. *Funicello*, 60 N.J. 60, 286 A.2d 55 (1972), cert. den. sub nom. *New Jersey* v. *Presha*, 408 U.S. 942 (1972). As modified by the New Jersey Supreme Court, N.J.S.A. 2A:113-3 now provides that no plea of guilty shall be received upon any indictment for murder. If such a plea is offered, it must be disregarded, a plea of not guilty must be entered, and a jury duly impaneled must try the case. The statute

permits, however, the accused to plead *non vult* or *nolo contendere* to the indictment. Upon such a plea, the sentence to be imposed is either life imprisonment or, in the alternative, the same as that imposed upon a conviction of second degree murder.

N.J.S.A. 2A:113-4 provides that every person convicted of first degree murder shall be sentenced to life imprisonment.[1] Upon a conviction of second degree murder, an accused is to be imprisoned for a maximum of thirty years. Thus, one convicted of first degree murder by a jury must receive a life sentence while one pleading *non vult* or *nolo contendere* may receive a sentence having a maximum of thirty years or life imprisonment.

Statement of the Case

An Essex County, New Jersey, Grand Jury returned an indictment against the Petitioner, Gary Messina, and one Anthony Flora, Jr., on July 29, 1976, charging both with violations of N.J.S.A. 2A:98-1, conspiracy; N.J.S.A. 2A:113-1, murder; and N.J.S.A. 2A:151-5, commission of said murder with a pistol. On November 29, 1976, a trial by jury commenced.

During the course of the trial, the Petitioner took the witness stand on his own behalf. In essence, he claimed that his co-defendant, Anthony Flora, Jr., had committed the murder unassisted by Messina (7T73 to 7T173).

After extensive cross-examination by the State, defense counsel for Petitioner requested that he be permitted to

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[1] Prior to *Funicello* v. *New Jersey*, 403 U.S. 948 (1971), and *State* v. *Funicello*, *supra*, 60 N.J. 60 (1972), a jury conviction of first degree murder mandated the imposition of the death penalty unless the jury recommended life imprisonment.

speak to his client out of the presence of the co-defendant. After this discussion, counsel indicated that his client wished to enter a plea of guilty to part of the indictment (8T101-22 to 23). It was Petitioner's wish to plead guilty to the counts charging armed murder but not to the count charging conspiracy (8T102-1 to 16). The State indicated that it would not recommend dismissal of the conspiracy count (8T103-1 to 10). The trial court would not accept the plea as offered by the defendant.

Resuming cross-examination, the Prosecutor asked his next question. Petitioner volunteered that he wished to plead guilty to armed murder and that Anthony Flora was not involved (8T106-21 to 25). He then admitted that he, Messina, had conceived and executed the plan to kill the victim. It was his claim that since the co-defendant was not involved, he wanted the blame to be properly placed. Two rebuttal witnesses for the State later testified that they overheard Messina state to his co-defendant, while they were in a cell during a recess, that Messina was going to "take the weight" or "go down on this." (9T121-1 to 8).

The jury later returned a verdict of guilty on all three counts of the indictment. For the murder, the Petitioner was sentenced to a mandatory term of life imprisonment.

ARGUMENT

POINT I

The petitioner has not presented for review any important federal question.

The Petitioner claims that he was denied due process by the trial court's failure to advise him, *sua sponte*, of the consequences of his confessing to the murder before the jury. In support of this contention, he relies upon those cases concerning the necessity to so advise a defendant who wishes to plead guilty to a criminal charge. Simply put, those cases are inapposite and do not support his theory.

A plea of guilty is something unique in the criminal justice process. A defendant pleading guilty admits before a court that he committed a crime and such a plea is the sole basis upon which the conviction stands. By entering a guilty plea he waives his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969). Thus, a guilty plea must be voluntary and knowing if it is to comport with due process.

The situation in the instant matter cannot be compared to the formal plea of guilty. The Petitioner, by confessing before the jury, did not waive those constitutional rights associated with a guilty plea. He did not need to be afforded any greater protection than any other defendant who is being cross-examined by a prosecutor.

Further, the Petitioner cannot implicate the case law pertaining to guilty pleas simply because he chose to

couch his confession in terms of a guilty plea. The constitutional requirements for the taking of a guilty plea apply only to that portion of the criminal justice process by which a defendant enters a plea as the sole basis for an adjudication of his guilt. Here, the Petitioner took the witness stand on his own behalf and subjected himself to cross-examination as any other witness. *United States* v. *Lowe*, 234 F.2d 919 (3 Cir. 1956), *cert.* den. 352 U.S. 838 (1957); *Myers* v. *United States*, 390 F.2d 793 (9 Cir. 1968), *cert.* den. 393 U.S. 880 (1968); *United States* v. *Fratello*, 44 F.R.D. 444 (D.N.Y. 1968).

POINT II

This case is not the appropriate vehicle by which to reappraise and reformulate the law applicable to guilty pleas.

Petitioner claims that this case "affords the Court a unique opportunity to harmonize disparate views among members of the Court concerning the judicial effect to be given extra-judicial and judicial confessions and admission." (Pb19). The State of New Jersey contends, however, that no disparate views have been expressed by this Court with regard to the issue here—the in-court confession before a jury.

In recapitulating the "various strands of judicial reasoning" in the areas of confessions and guilty pleas, the Petitioner shows no nexus between those cases and the situation presented here. The confession did not result from custodial interrogation in the *Miranda** sense nor can it be equated with the entry of a guilty plea. There is no important constitutional question involved.

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* *Miranda* v. *Arizona*, 324 U.S. 436 (1966).

POINT III

This is not a proper case for consolidation with *Corbitt* v. *New Jersey*.

Although the Petitioner was convicted and sentenced under the same sentencing scheme* as that involved in *Corbitt* v. *New Jersey*, prob. juris. noted 46 U.S.L.W. 3526, this is not an extraordinary case which should be consolidated. Should this court rule in favor of the appellant in *Corbitt*, the Petitioner here would derive any benefit from a finding of unconstitutionality of the statute.

Initially, it should be pointed out that the Petitioner did not attack the constitutionality of the New Jersey murder statute in his appeal to the Superior Court, Appellate Division. It was only when he petitioned for certification in the New Jersey Supreme Court that he raised this issue. He has not given the state courts the opportunity to rule on this question of federal constitutional law, and has thus not exhausted his state remedies. *Evans* v. *Delaware County, Com. of Pa.*, 390 F.2d 617 (3 Cir. 1968), *cert.* den. 393 U.S. 873 (1968); *Stanford* v. *Texas*, 379 U.S. 476 (1964), reh. den. 380 U.S. 926 (1965); *Douglas* v. *California*, 372 U.S. 353 (1963), reh. den. 373 U.S. 905 (1963).**

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* N.J.S.A. 2A:113-1, *et seq.*

** Contrary to the suggestions in the Petition, there is no indication in the record that Petitioner wished to plead guilty to avoid the mandatory sentence of life imprisonment.

CONCLUSION

For the foregoing reasons, the State of New Jersey respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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